82-1614

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BLAZER CORPORATION,

Petitioner,

—v.—

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. MCCRAINE and "JOHN DOES", said names being fictitious,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated: March 29, 1983

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

The following issues are presented for review of this petition:

1. Whether state statutes of limitation which extend special status to public agencies or officials may be "borrowed" to exclude liability for deprivations alleged under 42 U.S.C. § 1983.

2. Whether the Courts below erred in creating an expansive interpretation of the "respondeat superior" exclusion from 42 U.S.C. § 1983 liability so as to prevent the imputation of public agency wrongdoing to members of a public agency and to immunize such members from liability for passive or culpable neglect.

3. Whether the Courts below erred in creating an exclusion from the 42 U.S.C. § 1983 liability of a public agency chief executive for failure to perform statutorily mandated acts, because they are part of "an administrative plan to help the state regulate its officers' conduct."

4. Whether post-deprivation remedies under the New Jersey Eminent Domain and Relocation Benefits statutes existed sufficient to cure the deprivation of petitioner's rights to due process and equal protection of law.

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BLAZER CORPORATION,

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NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. MCCRAINE and "JOHN DOES", said names being fictitious,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Blazer Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 2, 1982.

OPINIONS BELOW

The judgment of the Court of Appeals is reproduced in the Appendix hereto at p. 36a. The unreported opinions of the District Court for the District of New Jersey from which appeal was taken dated November 16, 1981 and March 1, 1982, are also reproduced in the Appendix hereto at pp. 16a and 26a respectively.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

On December 2, 1982, the Court of Appeals for the Third Circuit entered its judgment in the matter for which review is sought on this petition. On December 29, 1982, the Court of Appeals entered its order denying petitioner's application for rehearing and for other relief. Jurisdiction to seek the writ of certiorari prayed for in this petition is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THE CASE INVOKES

Relevant Constitutional provisions, statutes, and regulations are quoted verbatim in the appendix annexed to this petition.

STATEMENT OF THE CASE

Petitioner, a small business dislocated and forced into bankruptcy so that Respondent New Jersey Sports and Exposition Authority (Sports Authority) could build a racetrack-stadium-sports arena complex, asserted claims pursuant to 42 U.S.C. § 1983 complaining of a systematic deprivation of New Jersey statutory relocation benefits. Petitioner contends that its constitutional rights to procedural due process (entitling it to timely notice of available benefits), substantive due process (entitling it to a fairly administered eminent domain system consistent with statutory mandates), and equal protection of the laws (entitling it to the same access to benefits which other agencies, which properly follow statutory mandates, extend to New Jersey property owners) have been violated by the systematic failure of the respondent Sports Authority, its chief executive (respondent Werblin) and the members of its Board (respondents Serraino, Foley, Kugler, Lewis, McCrane and Werblin) to carry out the mandates of the relevant New Jersey statutes and regulations. The Courts below granted summary

judgment dismissing all respondents on non-substantive grounds, including defenses of the statute of limitations (with respect to the Sports Authority only) and non-liability for the acts of subordinates under the doctrine of *respondeat superior.*

Deprivation of State Statutory Rights

The State of New Jersey has adopted a comprehensive statutory scheme securing to real property owners a series of rights in the event their property is taken by eminent domain. These statutory guarantees are set forth in the New Jersey Eminent Domain Act of 1971 (Chapter 361, Laws of 1971 N.J.S.A. 20:3-1 et seq.), the Relocation Assistance Law of 1967 (P.L. 1967, Chapter 79, N.J.S.A. 52:31B-1 et seq.), and the Relocation Assistance Act of 1971 (P.L. 1971, Chapter 362, N.J.S.A. 20:4-1, et seq.) (Relevant sections of said statutes are set forth in the appendix annexed hereto.) The statutes are implemented by a series of Regulations promulgated pursuant to statutory authority by the New Jersey Department of Community Affairs.

Among the rights guaranteed to property owners about to be displaced are the right to prompt payment of authorized relocation benefits and in "hardship cases", the right to such payments "in advance" of the property owner's removal from its premises. N.J.S.A. 20:4-10(a)(2) (A. 2a).* Petitioner was never given notice of the existence of this statutory right, and as a result of its displacement by eminent domain, it

> ". . . was compelled and driven first into receivership and then into bankruptcy, with a total loss of its business including, but not limited to, inventory, personal property, good will, ability to finance its business, and loss of contracts . . ." (Amended Complaint ¶ 28 (R. 837a)).

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* References in this Petition to materials contained in the appendix annexed hereto are designated by the abbreviation "A" followed by relevant page numbers. References to the record below which is comprised of two volumes entitled "Appendix on Behalf of Plaintiff Appellant" are designated by the abbreviation "R" followed by the relevant page number.

Also among the statutory rights conferred upon New Jersey displaced property owners is the right to payment for direct losses of tangible personal property such as inventory or work in process. N.J.S.A. 20:4-4(a)(2) (A. 2a). Petitioner was never given notice of its right to these benefits; it was never offered or paid any such benefits; and it lost personal property and inventory through destruction, theft and vandalism. (Amended Complaint ¶ 29 R. 837a)

Also among the rights of New Jersey displaced property owners is the right, pursuant to adminstrative regulation, to recover payment for physical and structural changes at its new location. Rules and Regulations of New Jersey Department of Community Affairs, Ch.6 ¶ 78 promulgated pursuant to Relocation Assistance Act of 1971 (A. 8a-10a). Petitioner was never given notice of its right to such a payment. No offer was made, and indeed, misrepresentations were made by certain respondents that petitioner would not be entitled to be paid for physical or structural changes at a new location. As a consequence, petitioner was unable to find a suitable new location, which contributed to the destruction of its business. (Amended Complaint ¶¶ 30 and 31 (R. 837a)).

Also among the stautory rights of a displaced property owner which were denied to petitioner was the right to be paid for reasonable expenses in searching for a replacement business (N.J.S.A. 20:4-4(a)(3) (A. 2a)).

New Jersey's Statutory Scheme of Administrative Accountability

In order to assure that state agencies focus upon the needs, interests and statutory rights of property owners to be displaced by eminent domain, New Jersey also requires that before any dislocation of property owners, agencies must *formulate* and implement an approved Workable Relocation Assistance Program (WRAP). Such a program must include:

> " . . . such measures, facilities, techniques or services as may be necessary. . . to determine the needs of displaced

> persons and business concerns for relocation assistance . . . and to assist in minimizing hardships . . . (3) to assist owners of displaced business concerns in obtaining and becoming established in suitable business locations; . . . (5) and to provide for fair and reasonable relocation assistance payments pursuant to Section 4 . . ." N.J.S.A. 52:31B-5 (A. 3a).

Respondents failed to forumulate a proper WRAP, in that the procedures they devised failed to contemplate and provide for the statutory benefits discussed above. (See Amended Complaint ¶¶ 20 and 21 (R. 835a)).

To secure further the rights conferred upon property owners by the New Jersey eminent domain statutes and to insure administrative accountability, N.J.S.A. 52:31B-5 mandates upon the chief executive officer of any state agency acquiring property for public use the obligation to certify to the Commissioner of the Department of Community Affairs ". . . that a workable relocation assistance program (WRAP) for displaced concerns, offering the . . . [statutorily mandated] services . . . is available to reduce hardship to those affected." N.J.S.A. 52:31B-5 (A. 3a). Implicit in such a requirement of course is the duty conferred upon an agency chief executive to review proposed programs to assure that their provisions comply with statutory requirements. The respondent chief executive David A. Werblin failed to certify such a program. Consequently approval of the program was never properly based upon the *informed certification* of the chief executive, as was also required by the statutory scheme. (Amended Complaint ¶ 54(b) R. 843a). Thus petitioner was deprived of the benefit of administrative review and screening by the respondent Werblin and informed approval by the Commissioner of the Department of Community Affairs. Had such screening, review and informed approval taken place, it could well have revealed and corrected the deficiences noted above.

In purported implementation of its uncertified relocation program, the Sports Authority and other respondents engaged

in and countenanced a pattern of failures to satisfy other mandated requirements, which included a failure to inform petitioner of the relocation benefits and assistance available, a failure to determine the extent of petitioner's need for assistance, a failure to provide current and continuing information on the availability of prices and locations of comparable commercial properties. Amended Complaint ¶ 22 (R. 835a-836a)

Among the more stunning institutional failures to satisfy express statutory requirements respondent Werblin caused a booklet entitled "If I Must Move" to be disseminated to relocatees through subcontract with the New Jersey Department of Transportation. *The* pamphlet was distributed to targeted property owners, ostensibly to advise them fully of their rights. *It* failed, among other things, to notify and alert property owners to the availability of advance relocation benefits in hardship cases. N.J.S.A. 20:4-10(a)(2) (A. 2a). (See also opinion at 30a), text of booklet reproduced at R. 559-567a).

Petitioner was evicted from its premises without ever receiving notice of the mandated benefits described above, and without knowledge of the deficiencies in WRAP certification and approval described above, in violation of the express provisions of N.J.S.A. 20:3-19, (A. 1a), *that section* requires that an eviction may take place only upon a judicial determination that the property owner has had adequate opportunity to obtain funds and expenses to which the law entitles it. (Amended Complaint ¶ 12, (R. 832a-833a)).

The Lawsuit

In this action commenced under 42 U.S.C.§ 1983,* petitioner complains of the entire panoply of statutory denials. The underlying property rights include petitioner's right to possession of its real property and its right to relocation benefits under the applicable New Jersey statutes. Petitioner seeks damages resulting from the failure of the Sports Authority to timely apprise it of its rights to benefits and for unlawful

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* Jurisdiction in the District Court below was originally invoked pursuant to 28 U.S.C. § 1343 and 1331(a).

termination of possession of its property. The resulting losses included petitioner's insolvency and the destruction of its business and goodwill. It has asserted that the respondents' conduct denies its Fourteenth Amendment constitutional rights to:

a) procedural due process in that it was never notified of valuable statutory rights to relocation benefits so as to enable it to claim and timely receive them in order to salvage its business from bankruptcy;

b) a procedural due process right to administrative screening and certification, derived from the statutory obligation of respondent Werblin to screen and certify a WRAP relocation plan conforming to state statutory mandates;

c) procedural due process which should have imposed the burden of proof upon respondent Sports Authority at its judicial eviction hearing to establish that the requirements of WRAP certification and approval had been satisfied (*Landon v. Plasencia*, __ U.S. __ (1982), 103 S.Ct. 321);

d) substantive due process in that the wholesale deprivations of petitoner's rights and undermines the basic fairness and integrity of the eminent domain system (See *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. granted* 102 S.Ct. 1426, *cert. dismissed* ____ U.S. ____;

e) equal protection of the laws in that the pattern of official misfeasance referred to above results in discrimination against petitoner and all property owners dislocated by the respondent Sports Authority, since it systematically denies to them the statutory benefits which the legislature intended to confer upon all property owners. See *Snowden v. Hughes*, 539 F.2d 256 (1st Cir. 1976); *Cordeco Devel. Corp. v. Vasquez*, 539 F.2d 256 (1st Cir. 1976); *Burt v. City of New York*, 156 F.2d 791 (2d Cir. 1946); *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79 (1916).

Dismissal in the District Court

Without grappling directly with the merits of petitioner's claims, the District Court below, piecemeal, has dismissed all of the respondents. In a decision dated November 16, 1981, respondent Sports Authority was granted the benefit of a two year statute of limitations under the New Jersey Tort Claims Act (A. 16a-25a) (Relevant provisions are set forth in the appendix attached hereto at 7a). Later, in a decision dated March 1, 1982, respondents members of the Sports Authority were dismissed because the allegations against them were construed as seeking to impose liability for the acts of subordinates on a *respondeat superior* theory not supportable under § 1983 interpretations (A. 26a-31a)). And respondent Werblin was dismissed upon the ground that his failure to screen and certify the agency-wide WRAP relocation program did not deny petitioner any constitutional rights but instead was only a part of an administrative plan to help New Jersey regulate official conduct. (A. 31a-35a).

On appeal, the Third Circuit, without opinion, cryptically affirmed the decisions below. (A. 36a-38a)

For the reasons which follow, Petitioner respectfully submits that the dismissal of all of the respondents was erroneous, involves substantial departures from § 1983 doctrine, and presents significant issues for decision by this Court.

REASONS FOR GRANTING THE WRIT

1. Granting New Jersey Tort Claims Act statute of limitations protection to the respondent Sports Authority conflicts with applicable decisions of this Court which deny the protection of sovereign immunity to such agencies in cases under 42 U.S.C. § 1983

This Court has repeatedly proclaimed that a public body is a "person" under the terms of 42 U.S.C. § 1983 and not entitled to immunity except in rare circumstances not applicable here. *Monell v. Dept. of Soc. Serv. of the City of New York*, 436 U.S. 690 (1978) (local government bodies), *Owen v. City of*

Independence, 445 U.S. 622 (1980), and *Lake Country Estates Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (public agencies). No effort has been made by respondents below, nor, we submit, would one have prevailed, to contend that the Sports Authority was structured with a specific intent to enable it to enjoy the protection of state sovereign immunity. See *Lake Country Estates, supra* at 401-402. Accordingly the Sports Authority, like municipalities in *Monell* and *Owen, supra* must be construed as a "person" in the parlance of Section 1983. As this Court elaborated in *Owen*,

> "By including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and Laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed." 445 U.S. at 647-48.

This case presents a prime example of a departure from *Monell, Owen* and *Lake Country, supra*, since the Courts below applied a six year statute of limitations to the individual respondent "persons" (denying their motion to dismiss on limitations grounds) and applied a two year statute to the respondent Sports Authority (granting its limitations dismissal motion). The sole distinction justifying the application of different statutes was the status of the Sports Authority as a public agency. We submit that in reaching this result, the Courts below, contrary to the above authorities, improperly bestowed upon the Sports Authority a status paramount to that of the individual "persons" before it.

Purporting to follow the "resemblance" test standard authorized in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) for purposes of borrowing local statutes of limitations, the District Court held that the Sports Authority was protected by the two year limitations period of the New Jersey Tort Claims Act, N.J.S.A. 59:8-8 (A. 7a). In establishing a limitations period,

that Act does not focus upon the nature of the tortious conduct. It merely provides that:

> "The claimant shall be forever barred from recovering against a public entity if . . . (b) two years have elapsed since the accrual of the claim."

When it denied the limitations claims of individual respondents, the court ruled that the § 1983 constitutional tort most resembles the tort of "unjustified interference with right to pursue lawful business relations, which is subject to a six year limitations period." (A. 20a-23a). However, with respect to the Sports Authority, the Court characterized the claim as being one ". . . for tortious injury to property at the hands of a public authority." (A. 20a), subject to a two year limitation period.

Although the District Court thought it was merely applying the authorized resemblance test, what it in fact did when it incorporated the New Jersey Tort Claims Act was to "borrow" a portion of sovereign immunity. New Jersey's Tort Claims Act is clearly a child of the sovereign immunity doctrine. Its inception came in response to the New Jersey Supreme Court's decision in *Willis v. Dept. of Conservation Development,* 55 N.J. 534, 264 A.2d 34 (1970) which denied sovereign immunity protection for tort claims but invited the Legislature to define the limits of tort liability. The basic approach of the Act is to re-establish sovereign immunity against tort claims except where the Act otherwise provides. See *Bell v. Bell,* 83 N.J. 417 at 423, 416 A.2d 829 (1980); *Malloy v. State,* 76 N.J. 515 at 518, 388 A.2d 622 (1978).

The resemblence test can be accommodated with the *Monell* doctrine by limiting it to an evaluation of the nature of the tortious *character of the wrongs complained of,* excluding as irrelevant the *character of the targeted defendant* as either a private person or a public agency. See *Ammburg v. City of Chester,* 494 F.2d 811 (3rd Cir. 1974); ". . . the applicable statute of limitations must be determined from the nature of the conduct involved" *Id.* at 814. Only in this manner can any

meaning be preserved to the clear declaration in *Monell* that local governments (and government agencies, see *Lake Country Estates, Inc., supra*), ". . . like every other § 1983 'person', by the very terms of the statute, may be sued for constitutional deprivations" 436 U.S. at 690-91.

Permitting state agencies or municipalities to claim the benefit of state Tort Claims Acts is also tantamount to granting them Eleventh Amendment immunity from suit, contrary to this Court's holding in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979) that Eleventh Amendment immunity is not to be conferred:

> "[U]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves." 440 U.S. at 401

No evidence of such an intent appears in the record below, and the Court's decision thus cannot be bolstered on this issue.

As the Court has mandated in the past:

> "State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute."
>
> *Occidental Life Ins. Co. of Calif. v. E.E.O.C.,* 432 U.S. 355 (1977) at 367

That directive has been violated by the Courts below, and petitioner respectfully requests that this Court issue the writ in order to review the matter.

2. A conflict among the Circuits exists with respect to the Tort Claims Act statute of limitations issue, which should be resolved by this Court.

An additional special and important reason exists supporting this petition. There is a distinct conflict between the statute of limitations decision below and decisions in other circuits. Long before this Court's decisions in *Monell* and *Owen* (but indeed presaging their reasoning) the Ninth Circuit put this very issue to rest in *Donovan v. Reinbold,* 433 F.2d 738 (9th Cir. 1970).

In rejecting the applicability to Section 1983 litigation of limitations provisions in the California Tort Claims Act, the Court reasoned that Congress has

> ". . . never indicated an intent to engraft onto the federal [1983] right state concepts of sovereign immunity or of state susceptibility to suit, which are the concepts that are the roots of the California Tort Claims Act. Indeed the history of Section 1983, summarized in *Monroe v. Pape*, supra, 365 U.S. 167 . . . vividly demonstrates that state concepts of sovereign immunity were alien to the purposes to be served by the Civil Rights Act . . . An incorporation of such state created policies would practically constitute a judicial repeal of the Civil Rights Act." 433 F.2d at 742.

The Court in *Donovan* also concluded that the nature of relief sought in 42 U.S.C. § 1983 was of a distinctly different order than that covered by the California Tort Claims Act, and therefore not subject to the provisions of the local statute, citing the concurring opinion of Mr. Justice Harlan in *Monroe v. Pape*, 365 U.S. 167 (1961) at 196;

> ". . . a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." at 196

On the other hand, the Eighth Circuit appears to follow the rule adopted by the Third Circuit below. *Peterson v. Fink*, 515 F.2d 815 (8th Cir. 1975).

In the Second Circuit, however, *Taylor v. Mayone*, 626 F.2d 247 (2d Cir. 1980) refused to apply to a 1983 claim, a one year New York statute of limitations for a sheriff, coroner or constable ". . . upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty" (N.Y.C.P.L.R. § 215(1)) upon essentially the same grounds as those asserted above in support of the writ which petitioner here seeks. The Second Circuit's decision in *Taylor* relied upon

its earlier decision in *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980), which had refused to apply the one year-ninety day limitation period of Section 50-(i) of New York's General Municipal Law. That statute applied to a municipality and its employees for personal injury by reason of the wrongful act of any of its officers, agents, or employees. As the *Quinn* court aptly observed in justifying its opinion:

> "In *Monell, supra,* the Supreme Court held that a municipality is a "person" for purposes of § 1983. Since 1963, this Court has consistently stated that § 214(2) [three year general tort statute of limitations] applies in § 1983 suits against "persons", see *Swan v. Board of Higher Education,* 319 F.2d 56 (2d Cir. 1963), even though § 50-(i)(1) includes, within its terms, city officers, agents, and employees. To create different limitations periods for two similarly situated classes of defendants would create a distinction without a difference, and would engender unnecessary confusion for litigants and judges alike. Thus, we hold that the most appropriate limitations period for suits against municipalities under § 1983 is that which has been heretofore applied in actions against individual municipal officers and employees." 613 F.2d at 449

Issues involving special limitations periods for torts of public officials continue to recur among the Circuits in 1983 actions. The Ninth Circuit has been required to repeat its *Donovan v. Reinbold* ruling on the inapplicability of the California Tort Claims Act limitation provision. *Ney v. State of California,* 439 F.2d 1285 (9th Cir. 1971). Similarly, in *Shouse v. Pierce County,* 559 F.2d 1142 (9th Cir. 1977) the Ninth Circuit rejected (construing it as a "claims" statute rather than a limitations statute) a ninety day municipal and public officer liability limitations statute, citing *Donovan v. Reinbold, supra.*

In *Pauk v. Board of Trustees of City U. of New York,* 654 F.2d 856 (2d Cir. 1981), the Second Circuit was confronted with still another variation of the issues decided earlier in *Taylor, supra.* There the Court observed that:

> "It would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights." *Id.* at 862

In so holding, the Court also emphasized the strong interest in establishing uniformity with respect to the issue of what limitations period to apply.

District Courts also continue to be plagued by the same issues. In addition to the two New Jersey District decisions which reached decisions contrary to the one adopted by Third Circuit below on the applicability of the New Jersey Tort Claims Act (*Peters v. Township of Hopewell,* 534 F.Supp. 1324 (D.N.J. 1982); *Erdman v. Board of Ed., Union Co.,* 541 F.Supp. 388 (D.N.J. 1982)), see *Gunther v. Miller,* 498 F.Supp. 882 (D.N.M. 1980) (following *Donovan v. Reinbold, supra* and holding 1983 action not governed by a limitations provision in New Mexico Tort Claims Act); *Perrote v. Percy,* 452 F.Supp. 604 (E.D.Wis. 1978) (90 day attorney general notice of claim statute for suits against state officers not applicable to 1983 actions); *Skrapits v. Skala,* 314 F.Supp. 510 (N.D.Ill. 1970) (six month notice of claim statute inapplicable to 1983 actions). A contrary result, consistent with the District Court's opinion adopted by the Third Circuit below, was reached in *Gipson v. Bass River,* 82 F.R.D. 122 (D.N.J. 1979).

The fact that issues involving public body and public employee special statutes of limitations continue to recur, even in Circuits which have definitively decided the issue, indicates the unsettled status of the law in this area and constitutes additional support for the granting of the writ sought here. Because of this, and because of the conflict among the Circuits in resolving the issue, petitioner respectfully prays that the writ be issued.

3. The decisions below interpreting the scope of the *respondeat superior* exclusion from § 1983 liability is in conflict with this Court's decision in *Monell v. Dept. of Soc. Serv. of the City of New York*, 436 U.S. 690 (1978)

Some time ago, this Court expressly held that a public body:

> ". . . cannot be held liable solely because it employs a tortfeasor—or in other words . . . [it] cannot be held liable under § 1983 on a *respondeat superior* theory."

Monell v. Dept. of Soc. Serv. of the City of New York, 436 U.S. 658 (1978) at 691, because § 1983 imposes liability only when a "person" subjects or 'causes' another to be subjected to a deprivation of rights. Therefore, it is only when

> ". . . execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id* at 694. See also *Owen v. City of Independence*, 445 U.S. 622 (1980) at 655.

In this case the District Court adopted an expansive view of *respondeat superior* which emasculated the scope and protection of the Civil Rights Statute. From a review of its opinion on the matter, the District Court apparently concluded that individual respondents, members of the Sports Authority, could not be liable for passive deprivations of rights, observing that they could only be liable for their own

> ". . . conduct or participation in a pattern of violations by virtue of knowledge, acquiescence, support and encouragement." (A. 29a).

Such a construction improperly excludes the situation in which a defendant "causes" a plaintiff to be deprived of rights through non action or culpable neglect. That construction is inconsistent with this Court's reasoning in *Monell*.

The District Court below also ruled that:

> "to hold these defendants liable for the *actions of the Authority,* or D.O.T. employees under the circumstances, is to base liability, in my judgment, on the doctrine of *respondeat superior.*" (A. 30a) (emphasis added)

Such a definition stands the theory of *respondeat superior* upon its head, so as to exonerate public officials for any conduct of the agency for which they are employees. Again, we respectfully submit that this was not the intended meaning of *respondeat superior* as that term was used by this Court in *Monell.* (Indeed it suggests a new doctrine of *respondeat inferior*!) Because the precise scope of the term is unclear, petitioner submits that the writ should be granted in order to prevent an unrestrained expansion of the term "respondeat superior" from consuming the protective power of the Civil Rights Act.

In fact, the record clearly supports a *prima facie* case of liability in accordance with this Court's ruling in *Monell, supra.* The Court below specifically found the Sports Authority's WRAP plan to be deficient in that it ". . . did not contain a proper eviction policy." (A. 30a). Moreover, the official publication "If I must move did not inform dislocatees of the availability of hardship advance payments (A. 30a). Among other things, the applicable rules and regulations also provide with respect to the WRAP plan:

> "Whether or not the agency responsible for the displacement administers relocation activities, the local agency has the obligation to assure that relocation assistance and payments are provided in accordance with State law and policies, standards and regulations." N.J.D.C.A. Rules and Regulations, Ch.2§ 3a(3), quoted at A. 11a).

Respondents also caused the dissemination (through subcontract with the New Jersey Department of Transportation) of a booklet which failed to apprise prospective dislocatees of their rights, including their rights in hardship cases to advance

payment of benefits, and the failure (in the case of respondent chief executive Werblin) to screen and certify the WRAP plan as part of a procedure to assure that the relocation statutes are being effectively executed.

Respondents were members of the local agency—the Sports Authority. As such, the duty devolved upon them to see that the WRAP plan and relocation procedures conformed to statutory requirements. Respondent Werblin was additionally mandated with the express duty to certify the WRAP plan to the Commissioner of the Department of Community Affairs.

Clearly the principal deficiencies complained of in this action are institutional in scope and nature. In the words of the First Circuit, they are

> ". . . so pervasive that the agency head, because of his statutory duties and powers, must be considered a responsible party . . . *Naughton v. Beviliacqua,* 605 F.2d 586 (1st Cir. 1979) at 589.

They are not sporadic incidents over which an agency head (or agency members) might not have knowledge or control. The liability of the individual respondents for the above agency deficiencies is not vicarious. It is direct. In the parlance of the *Monell* decision, the inaction of the individual respondents, in violation of their statutory and constitutional duties, constituted the

> "execution [or more appropriately the non-execution] of a government's policy or custom . . . by those whose edicts or acts may fairly be said to represent official policy." *Monell v. Dept. of Soc. Serv. of City of New York,* 436 U.S. 690 (1978) at 694.

which inflicted petitioner's injury. It was improper for the Court to rule to the contrary, at least at the summary judgment stage of the proceedings. In order to prevent the erosion of the effectiveness of § 1983 by providing a loosely controlled *respondeat superior* escape hatch, this Court should grant the writ of certiorari for which petitioner prays.

4. Whether there should be an exclusion of liability for administrative acts to regulate agency conduct should be settled by this Court to prevent an unwarranted dilution of the effectiveness of 42 U.S.C. § 1983

The District Court also improperly dismissed the respondent Werblin, chief executive of the Sports Authority on the theory that his failure to certify the WRAP relocation plan to the New Jersey Commissioner for Community Affairs did not involve a property right of petitioner but was instead merely a part of a plan to ". . . help the state regulate its officers' conduct." (A. 34a). The Court's reasoning on this issue was based upon a Third Circuit decision entitled *United States v. Jiles*, 658 F.2d 194 (3rd Cir. 1981) *cert. denied* 455 U.S. 923. Jiles was a criminal case. It is inapposite to the issues involved in the instant appeal. Its reasoning has not heretofore been considered by this Court or applied to Civil Rights Act cases. Isolation of the single event of failure to certify was myopic and failed to acknowledge that petitioner has alleged the pattern of deprivations described throughout this petition. Failure to certify is merely a single instance.

The fact is that respondent Werblin, as chief executive, represents the official policy and position of the Sports Authority. Obviously, had the Sports Authority not been improperly dismissed (see points 1 and 2, *supra*) it would stand to be liable for the transcendent pattern of rights deprivations alleged in this action. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). Certainly, however, in its absence as a party, respondent Werblin should not be permitted a procedural escape from responsibility for the pattern over which he presided.

5. The scope of this Court's decision in *Parratt v. Taylor* with respect to the extent to which the availability of post-deprivation remedies may cure due process violations should be settled by this Court.

Respondents argued in the Circuit Court that petitioner had not stated a claim for § 1983 relief because it did not suffer a deprivation of property rights. See brief of Respondent Sports Authority below at p.44). This argument, based upon this Court's decision in *Parratt v. Taylor,* 451 U.S. 527 (1981), was premised upon the notion that even if petitioner suffered the deprivations about which it complained, it could have later been made whole in administrative and local judicial proceedings.

Parratt is clearly distinguishable, and its rule would be misapplied in this case. The alleged due process deprivation there involved the loss by prison officials of a hobby item mail-ordered by petitioner, an incarcerated prisoner. There was simply no way petitioner could have been granted pre-deprivation due process notice and hearing rights, since there was no way the state could have known that the loss would occur. *Parratt* should be limited to its facts. It obviously has no application in this case, in which petitioner contends that had petitioner been notified of the relocation rights available to it, it could have exercised those rights and avoided bankruptcy. See *Duncan v. Poythress,* 657 F.2d 691 (5th Cir. 1981) at 704. *Cert. granted* ____ U.S. ____; *cert. dismissed* ____ U.S. ____.

To suggest that post-deprivation relief would have sufficed for petitioner as this Court held would have sufficed in *Parratt,* is simply to rub salt into petitioner's wounds. Had petitioner known at the time it was displaced of the availability of advance payments in hardship cases and of the other benefits available to it, it would have been able to avail itself of such benefits and bankruptcy would not have been necessary.

Finally, unless this Court grants the writ and limits the scope of *Parratt* on the matter, there is a substantial danger that *Parratt* will be broadly misinterpreted to engraft an exhaustion

of remedies requirement upon 1983 claims, contrary to the repeated holdings of this Court that exhaustion is not a requirement.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: March 29, 1983

APPENDIX

New Jersey Eminent Domain Act of 1971

N.J.S.A. 20:3-19. Right to possession and vesting of title

A copy of the declaration of taking and notice of the filing thereof and of the making of the aforesaid deposit, shall be served upon the condemnee and all occupants of the property in accordance with the rules, and proof of such service shall be filed in the action. Thereupon, the right to the immediate and exclusive possession and title to the property described in the declaration of taking shall vest in the condemnor, free and discharged of all right, title, interest and liens of all condemnees without the necessity of further process provided however, that the court may, upon application and good cause shown, stay the taking of possession of the land or other property, or authorize possession to be taken upon prescribed conditions. A property owner who refuses to vacate said property or yield possession and remains in possession more than 20 days after service of notice shall be deemed a trespasser and shall be then liable for rents, issues and profits 20 days after service. The court, upon notice and after determining that the property owner has had adequate opportunity to obtain any funds payable to him under sections 23 and 26 of this act[1] and any other expenses to which he may be entitled to as a matter of law, shall enter an order for possession directed to the sheriff of the county in which the property is located. If the owner or tenant occupies the property with the condemnor's permission on a rental basis for a short term or for a period subject to termination on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short term occupier. Such right, title and interest shall be transferred and shall attach to the compensation determined to be payable hereunder, to the same extent and in the same order of priority as existed at the date of vesting of title in condemnor. The pendency of an appeal from an award of judgment hereunder shall not interfere with such vesting of title.

New Jersey Relocation Assistance Act of 1971

N.J.S.A. 20:4-4 Moving and related expenses

a. If a taking agency acquires real property for public use, it shall make fair and reasonable relocation payments to displaced persons and businesses as required by this act, for:

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the taking agency; and

(3) actual reasonable expenses in searching for a replacement business or farm.

N.J.S.A. 20:4-10 Authority of the commissioner

a. The commissioner shall adopt such rules and regulations as may be necessary to assure:

(2) that a displaced person who makes proper application for a payment authorized for such person by this act shall be paid promptly after a move or, in hardship cases, be paid in advance; and

New Jersey Relocation Assistance Act of 1967

N.J.S.A. 52:31B-5 Relocation assistance program; determinations; formulation and execution of program.

(a) Whenever any State agency or any unit of local government acquires or seeks to acquire any real property for public use, or implements or intends to implement a program of law enforcement, or initiates or intends to initiate a program or project for the voluntary rehabilitation of dwelling unit, the chief executive officer of any such State agency or unit of local government shall certify to the commissioner that a workable relocation assistance program for displaced persons and business concerns, offering the services prescribed by subsection (b) of this section, is available to reduce hardship to those affected. If the commissioner or the chief executive officer of any such State agency or unit of local government shall determine, in the exercise of their discretion, that the acquisition of real property for a public use or implementation of a program of law enforcement or the initiation of a program or project for the voluntary rehabilitation of dwelling units by any such State agency or unit of local government will cause substantial economic injury to persons and business concerns other than those persons of business concerns with relocation services pursuant to a workable relocation assistance program.

(b) Every workable relocation assistance program required by subsection (a) of this section shall include such measures, facilities, techniques or services as the commissioner may prescribe by rules and regulations issued and promulgated pursuant to this act, including, but not limited to, such measures, facilities, techniques or services as may be necessary or appropriate (1) to determine the needs of displaced persons and business concerns for relocation assistance to supply information concerning programs offering assistance to displaced persons and business concerns and to assist in minimizing hardships to displaced persons in adjusting to relocation; (2) to

assist each displaced person to secure decent, safe and sanitary dwelling units at prices or rents within his means and in areas reasonably accessible to his place of employment and not generally less desirable in regard to public utilities and public and commercial facilities; (3) to assist owners of displaced business concerns in obtaining and becoming established in suitable business locations; (4) to provide any displaced person or business concern a reasonable time from the date of displacement within which to apply for a relocation assistance payment required by section 4 of this act, and to encourage the prompt transmittal of any such relocation assistance payment upon proper application therefor; (5) and to provide for fair and reasonable relocation assistance payments pursuant to section 4 of this act; (6) to secure to the greatest extent practicable, the coordination of relocation activities with other project activities and other planned or proposed governmental actions in the community or nearby areas which may affect the execution of the workable relocation program.

(c) Within 60 days of the effective date of this act, any State agency or unit of local government which reasonably contemplates that any person or business concern may be displaced by the acquisition of real property for public use or the implementation of a program of law enforcement or the initiation of a program or project for the voluntary rehabilitation of dwelling units, shall designate or appoint an officer or employee therof who shall be charged with the formulation and execution of any workable relocation assistance program required by section (a) of this section. Any such State agency or unit of local government, acting through the officer or employee so designated or appointed, may utilize the facilities, personnel or services of any other officer or employee of said State agency or unit of local government, or may enter into appropriate contracts or agreements with any officer of the United States or any other State agency or unit of local government, or with any nonprofit organization, for the purpose of implementing any workable relocation assistance program.

N.J.S.A. 52:31B-6 Emergency or imminent hazard to public health, safety and welfare.

(a) No State agency or unit of local government shall, except in the case of an emergency or an imminent hazard to the health, safety and welfare of the public, displace or remove, or cause to be displaced or removed, any person or business concern on account of the acquisition of any real property for public use or on account of a program of law enforcement or on account of a program or project for the voluntary rehabilitation of dwelling units, unless (1) any workable relocation assistance program required by subsection (a) of section 5 of this act shall have been submitted to, and approved by, the commissioner; (2) the chief executive officer of said State agency or unit of local government shall have filed with the commissioner the certification required by subsection (a) of section 5 of this act; (3) an alternate dwelling unit as described in section 5(b) (2) of this act is available for each person displaced or removed, or caused to be displaced or removed; and (4) the commissioner shall have certified to the chief executive officer of said State agency or unit of local government that the provisions of this act have been complied with.

(b) Any State agency or unit of local government which, in the case of an emergency or an imminent hazard to the health, safety and welfare of the public, displaces or removes, or causes to be displaced or removed, any person or business concern on account of the acquisition of any real property for public use or on account of a program of law enforcement or on account of a program or project for the voluntary rehabilitation of dwelling units, shall do any and all things necessary and appropriate to provide, that, as soon after the displacement or removal of any such person or business concern as possible, (1) any workable relocation assistance program required by subsection (a) of section 5 of this act will be submitted to the commissioner the certification required by subsection (a) of section 5 of this act; (3) an alternate dwelling unit as described in subsection (b) (2) of section 5 of this act is

available for each person displaced or removed, or caused to be displaced or removed; and (4) the commissioner will certify to the chief executive officer of said State agency or unit of local government that the provisions of this act have been complied with.

New Jersey Tort Claims Act

N.J.S.A. 59:8—8. Time for presentation of claims

A claim relating to a cause of action for death or for injury to person or to property shall be presented as provided in this chapter[1] not later than the ninetieth day after accrual of the cause of action. After the expiration of 6 months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity if:

a. He failed to file his claim with the public entity within 90 days of accrual of his claim except as otherwise provided in section 59:8—9; or

b. Two years have elapsed since the accrual of the claim; or

c. The claimant or his authorized representative entered into a settlement agreement with respect to the claim.

Nothing in this section shall prohibit an infant or incompetent person from commencing an action under this act within the time limitations contained herein, after his coming to or being of full age or sane mind.

Rules and Regulations Adopted by Department of Community Affairs, Chapter VI, ¶ 78

STATE OF NEW JERSEY
DEPARTMENT OF COMMUNITY AFFAIRS

[SEAL]

Rules and Regulations Adopted by the Department of Community Affairs Pursuant to the Relocation Assistance Law of 1971 (P.L. 1971, C. 362)

PATRICIA Q. SHEEHAN
Commissioner

* * *

78. *PHYSICAL CHANGES AT NEW LOCATION.*

a. *Policy.* The cost of making physical changes in or to a building to which a business concern relocates may be eligible as a moving expense under the following provisions and limitations:

(1) *The physical changes must be necessary* to permit the reinstallation of specific items relocated or substitute machinery or equipment necessary to the continued operation of the business, or be required to meet local codes or ordinances related to the installation and use of the machinery or equipment.

(2) *The cost of foundations, concrete pads, or other similar construction* required for the reinstallation of relocated or substitute machinery or equipment may be eligible provided that the construction is necessary to the proper operation of the equipment, and compensation for a similar installation was not made to the business concern as part of the price paid to acquire the former property.

(3) *Changes in or to a building or structure* may not increase the value of the building or structure for general

purpose uses, may not increase the structural or mechanical capacity of the building or of its components beyond the requirements of specific types of equipment moved from the old location or replaced with a substitute, nor include building or structural alterations required by local building codes and ordinances, except if required for the installation of specific types of equipment moved from the old location or necessary for the continuation of the business. No relocation payment in connection with a change in or to a building or structure shall be made for any items for which compensation was made as an acquisition cost at the old location.

(4) *The local agency must receive prior DCA concurrence* in a determination that the physical changes are required by local law or ordinance or are necessary to reinstallation or reconnection of the equipment. If DCA concurrence is requested after a move has been completed and a relocation claim submitted, no portion of the claim related to the cost of the physical changes may be paid, prior to DCA concurrence.

(5) *The business concern must submit the following documentation* to the local agency:

(a) *A detailed description or drawing*, or both, of the installation in the former location.

(b) *A detailed description or drawing*, or both, of the installation as proposed or actually installed.

(c) *A copy of all instructional materials or drawings* to be provided to contractors or workmen.

(d) *A statement describing the basis for the estimated or actual cost* related to the physical changes.

(e) *A statement explaining why the changes are necessary* to reinstallation of the equipment.

b. *Local Agency Action.* In any case where it appears that physical changes must be made to a building, the business concern shall discuss its plan with the local agency before the move so that an agency determination of acceptability can be made. If the local agency finds that compensation for the changes may be eligible, DCA concurrence shall be obtained prior to the move. When the documentation described in subsection 78a(5) has been received, the local agency shall:

(1) *Review the documentation* and determine whether the physical changes meet the requirements set forth above, and whether the costs are reasonable.

(2) *Where applicable, secure an opinion of local agency counsel* stating that the changes are required by law. The opinions should include appropriate citations.

(3) *Assure that the value of any equivalent items* included in the acquisition payment made to the owner of the real property or to the business concern is excluded from the amount to be included in the relocation payment.

(4) *Submit to DCA the documentation received* from the business concern, together with the local agency's written recommendations.

(5) *Not make the payment until DCA concurrence is received* (see subsection 78a(4) above). (DCA will advise the local agency, in writing, of the results of its review.)

Rules and Regulations Adopted by Department of Community Affairs Chapter 2, 3(a)(3)

3. *THE RELOCATION PLAN.*

a. *Description of Administrative Organization.*

* * *

(3) Whether or not the agency responsible for the displacement administers relocation activities, the local agency has the obligation to assure that relocation assistance and payments are provided in accordance with State law and policies, standards, and regulations.

* * *

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

Decision of Chief Judge Clarisson F. Fischer dated February 9, 1981

THE COURT: That's right. That is the problem, although I don't know that he has got much of a case. I will put my reasons down. You don't have to argue this.

Defendant, New Jersey Sports & Exposition Authority et. al., moves this Court to dismiss plaintiff, Blazer Corporation's complaint for failure to exhaust state judicial and administrative remedies. Plaintiff asserts federal jurisdiction under 42 U.S.C. § 1983, alleging that defendant's actions under color of New Jersey laws N.J.S.A. 20:3-1 (Eminent Domain Act of 1971); N.J.S.A. 52:31B-1 (Relocation Assistance Act of 1967); and N.J.S.A. 20:4-1 (Relocation Assistance Act of 1971) caused plaintiff damages by forcing it to declare bankruptcy and suffer the total loss of it's business. Plaintiff argues that Defendant failed to follow New Jersey statutory procedure and thereby caused the alleged loss. Defendant points to a pending state court eminent domain action, *New Jersey Sports & Exposition Authority v. Blazer Corp.*, No. L-20951-72 (1973) and urges exhaustion of remedies before this Court takes jurisdiction. Plaintiff argues, however, that since they cannot seek destruction of business damages in the eminent domain proceeding in state court, and since the total loss of a business is compensable under § 1983, there is no need for exhaustion.

This case arises out of the following events. Plaintiff manufactured custom-built air conditioning systems at its 10.7 acre leased premises in East Rutherford, New Jersey. In 1973, defendant determined that plaintiff's leasehold was needed for a public purpose, to wit: the Meadowlands complex. Defendant filed a declaration of taking on March 20, 1973, placed $1,330,395.00 in the Superior Court Trust Fund for the value of the premises, and ultimately evicted plaintiff in August 1974. Allegedly, no relocation information or financial assistance for the move was offered plaintiff. This allegation is controverted by the defendant. Although the factual background contains more nuances, we save that for a later day since our concern is the immediate motion to dismiss.

There is no question that plaintiff's alleged damages from the destruction of it's business is an appropriate action under § 1983. *Lynch vs. Household Finance Corp.*, 405 U.S. 538 (1971). It cannot be doubted that among the civil rights intended to be protected from . . . state action . . . are the rights to acquire, enjoy, own and dispose of property. *Id.* at 544. The "dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights". *Id.* at 552. Defendant's actions under color of state law allegedly caused plaintiff to suffer destruction of it's business. Thus, a cognizable claim under § 1983 has been alleged.

Since plaintiff has alleged a valid § 1983 claim, there is generally no need to exhaust state administrative or judicial remedies. *Monroe v. Pape*, 365 U.S. 167 (1960); *McNeese v. Board of Education*, 373 U.S. 668 (1962); *Hochman v. Board of Ed. of City of Newark*, 534 F.2d 1094 (3d Cir. 1976); *United States ex. rel. Ricketts v. Lightcap*, 567 F.2d 1226 (3d. Cir. 1977). Relief under § 1983 may not be defeated because relief was not first sought under New Jersey law. *See McNeese, Supra* at 671. The federal remedy is supplementary to the state remedy. *Monroe, supra* at 183. Not only would the exhaustion requirement be inappropriate here, it would also defeat the purposes of § 1983 if held that assertion of a federal claim in federal court must await an attempt to vindicate the same claim in New Jersey court. *McNeese, supra* at 672. Further, *Elmwood Properties, Inc. v. Conzelman*, 418 F.2d 1025 (7th Cir. 1969) relied upon by defendant is inapposite. There, the plaintiff could litigate the building permit refusal in state court whereas plaintiff here cannot allege damages from loss of business in a New Jeresy eminent domain proceeding. *State v. Gallant*, 42 N.J. 583, 587 (1964); *State of New Jersey v. Cooper Alloy Corp.*, 136 N.J. Super. 560, 568 (App. Div. 1975). Thus, it would be tautological to require plaintiff to first seek state law remedies when such do not exist.

Nor is abstention proper. At it's core, abstention requires a federal court to refrain from deciding federal constitutional issues until related state law issues have first been adjudicated.

D'Iorio v. County of Delaware, 592 F.2d 681, 685 (3d Cir. 1978). In *D'Iorio* the Third Circuit set out the test for invoking the abstention doctrine:

> First, there must be uncertain issues of state law underlying the federal constitutional claim. Second, these state law issues must be amenable to an interpretation by the state court that would obviate the need or substantially narrow the scope of the adjudication of the constitutional claims. And third, it must appear that an erroneous decision of state law by the federal court would be disruptive of important state policies.

New Jersey provides a statutory framework from which condemnees such as plaintiff derive due process protection. That statutory scheme does not permit damages for destruction of business. *Gallant, supra.* Thus, there is not an unclear state law issue that would, if decided by the New Jersey court, obviate the need for the federal action. Further, plaintif alleges that under color of that statutory authority and by omission of duty, defendant forced plaintiff's business into bankruptcy. Since this claim is not cognizable in the New Jersey court proceeding and since plaintiff is not asking this court to interpret the New Jersey statute, there is no need to abstain under the *D'Iorio* test. Although I do not pass on the ultimate merits of plaintiff's complaint, I do hold that it is an appropriate § 1983 action and that exhaustion of remedies and abstention do not apply.

Defendant's motion to dismiss is denied. Plaintiff to submit an appropriate order within 5 days. No costs.

Thank you, gentlemen.

Decision of Judge Harold A. Ackerman dated November 16, 1981

THE COURT: This action arises out of the acquisition by the State of New Jersey through its agent, the New Jersey Sports and Exposition Authority (Authority) of land in East Rutherford, New Jersey for development as the Meadowlands Sports Complex.

Plaintiff is Blazer Corporation, which was located in East Rutherford at the time this cause of action accrued and was in the business of constructing specialized air-conditioning systems.

Defendants are the Authority and the individual members of the Board of Commissioners of the Authority. Plaintiff complains that it was dislocated in violation of the Relocation Assistance laws of 1967 and 1971, NJSA 52:31B-1 et seq., and NJSA 20:4-1 et seq., and in violation of the New Jersey Eminent Domain Act of 1971, NJSA 20:3-1 et seq.

Plaintiff alleges that it went into bankruptcy as a direct result of the illegal dislocation and the defendants therefore deprived it of its property without due process of law in violation of the Fourteenth Amendment. 28 U.S.C. Section 1331(a) and 42 U.S.C. Section 1983 are asserted as the basis of this Court's jurisdiction over this action.

I interpret the complaint as essentially basing jurisdiction on 28 U.S.C. Section 1343(3) and 42 U.S.C. Section 1983. There is also an allegation in the complaint that these acts violated plaintiff's right to equal protection of the laws of New Jersey under the United States Constitution and violated certain federal statutes regarding relocation.

Upon discovery that no federal monies were used in the Sports Complex project, plaintiff abandoned the federal statutory claims.

The case is before me today on several motions of the parties. Plaintiff Blazer Corporation moves for summary judgment on the issue of liability. Defendant Authority moves to dismiss the complaint as untimely.

The individual defendants moved that summary judgment in their favor is appropriate because the complaint fails to state a cause of action cognizable under Section 1983, plaintiff has failed to join necessary parties, and the nonliability of the individual defendants is beyond doubt.

These motions raise many difficult issues. For the reasons set forth, I will not reach all of the issues raised.

The following facts, however, are undisputed.

On March 20, 1973, the Authority filed a complaint in condemnation and a declaration of taking on the property leased to plaintiff in Bergen County Superior Court after a written offer had been rejected. The Authority has the power to acquire land through condemnation. NJSA 5:10-5(m) and exercised that power pursuant to the Eminent Domain Act, NJSA 20:3-1 et seq.

At the same time, the Authority deposited $1,115,000 as an estimated just compensation, and later supplemented it with an additional $214,395.

On November 12, 1973, Judge Trautwein entered an order after hearing motions by both parties to the condemnation proceeding allowing Blazer Corporation to withdraw the estimated compensation and setting February 1, 1974 as the date of vacation with certain conditions regarding the pro rata share of taxes and other expenses. By consent or court order, this date was extended several times until August 15, 1974.

The parties dispute whether the defendants fulfilled the legal prerequisites for the dislocation to take place on August 15, 1974.

However, it is also undisputed that in April of 1973, the Authority entered into a contract with the New Jersey Department of Transportation (DOT) to formulate and implement a relocation assistance plan for and on its behalf as allowed under the relocation statute and applicable regulations.

In accordance with this agreement, DOT established a relocation office on the Sports Complex site and developed a plan. The parties dispute whether this plan was properly certified, what assistance and expenses plaintiff was entitled to, and also

whether plaintiff was the recipient of any and all assistance and expenses it was entitled to.

The first of the motions that I will consider is the Authority's motion that the action is barred as untimely.

I have concluded that the complaint as to the Authority was not brought in time. Defendant Authority moves to dismiss the complaint against it on the grounds that the applicable Statute of Limitations is the two-year limitation for actions brought under the New Jersey Tort Claims Act. NJSA 59:8-8. That statute provides in pertinent part:

"The claimant shall be forever barred from recovering against a public entity if . . . (b) two years have elapsed since the accrual of the claim."

Plaintiff raises several arguments in defense of timeliness of the complaint. It argues first that defendant has waived the defense of limitations under Federal Rule of Civil Procedure 12(h)(1) by failing to plead the Tort Claims Act in its answer and by failing to raise it in the first pretrial motion filed by the Authority in this suit. Alternatively, Blazer argues that the applicable limitations period for a suit under Section 1983 is no less than six years. I am not persuaded by any of these arguments.

The defense of Statute of Limitations is an affirmative defense that must be raised in a responsive pleading, but Defendant Authority did so. The fact that it did not mention the Tort Claims Act by name is irrelevant.

Furthermore, this defense is not the kind of challenge to an action which is least favored under Rule 12, and which therefore must be raised at the initial stage of the proceeding or not at all.

Those challenges, such as improper venue or insufficient service of process, are expected to be raised at the earliest possible moment because they "can often be connected in a timely fashion." *Weaver vs. Bowers,* Slip Opinion No. 80-1245 (September 8, 1981, 3d Cir.). A statute of limitations defense is properly considered a species of the defense of failure to state a claim upon which relief can be granted. *See Bethel v. Jendoco*

Construction Corporation, 570 F.2d 1168, 1174 (3d Cir. 1978); 5 Wright and Miller, Federal Practice and Procedure, Section 1360. Therefore, the motion can be considered at this juncture. See Federal Rule of Civil Procedure 12(h)(2).

Congress has not provided a limitations period for actions brought under the Civil Rights Act. Therefore, federal courts apply to a Section 1983 action the State Statute of Limitations that would be applicable "had an action seeking similar relief been brought under state law." *See Polite v. Diehl,* 507 F.2d 119, 122 (3d Cir. 1974) (en banc).

Our selection requires both a characterization of the nature of the federal claim and an examination of the New Jersey law on limitations periods. In our circuit, the district courts may give separate treatment to different aspects of the same complaint. *See Davis v. United States Steel Supply,* 581 F.2d 355, 342, Note 8 (3d Cir. 1978).

I find that it is appropriate to consider the claims against the Authority distinct from those against the individual defendants.

In *Meyers vs. Pennypack Woods Home Ownership Association,* 559 F.2d 894, 901 (3d Cir. 1977), the court of appeals identified three perspectives that should be utilized to analyze the federal claim: (1) the defendants' conduct; (2) the plaintiff's injury; and (3) the relief requested.

As plaintiff admits, the Authority's alleged conduct that is the source of his complaint is a violation of statutory mandates. The Authority will be liable, if at all, because of its official misconduct. Furthermore, in examining the other *Meyers* elements, I find the plaintiff seeks damages for tangible injuries to his asserted rights to lawfully pursue his business until lawfully evicted.

As plaintiff's complaint sets forth, it claims that the defendants "deprived the plaintiff of its ability and means to carry on its business, causing extreme damage to business and property." See Paragraph 49.

Also, as in *Meyers,* the wrong plaintiff complains cannot be read as arising out of a contract with the defendants. In

Meyers, where the injury complained of was the refusal to contract for the sale of a house in violation of 42 U.S.C., Sections 1981 and 1982, the court stated:

"Although the complaint may be read as alleging a wrongful refusal to enter into a contract, it cannot possibly be construed as alleging the breach of any existing contract. Meyers' cause of action arises not from a breach of promise, but from a breach of duty. It must therefore find its analogy in some sort of action in tort." See 559 F.2d at 901.

The complaint by Blazer Corporation sounds most like the tort recognized in New Jersey of unjustified interference with right to pursue lawful business relations. *See Middlesex Concrete Products and Excavating Corporation vs. Carteret Industrial Association,* 37 N.J. 507 (1962).

As I indicated, the complaint sounds most like this tort, except that as plaintiff admits, the defendant's interference would have been justified under principles of eminent domain absent the relocation statutes. For these reasons, I have concluded that the claim against the Authority is most appropriately characterized as a claim for tortious injury to property at the hands of a public authority.

I must next examine the New Jersey Statute of Limitations scheme in order to find the proper analogy for the civil rights injury just characterized.

While the applicable Statute of Limitations for a Section 1983 suit is a matter of federal law, I am persuaded by the reasoning of a New Jersey court that held in an employment discrimination suit against a municipality under Section 1983 that constitutional injuries were covered by the New Jersey Tort Claims Act. *See Lloyd vs. Borough of Stone Harbor,* 179 N.J. Super. 496 (Law Division 1981).

In Lloyd, the court found the two-year period applicable to the claim against the municipality even while finding the New Jersey general six-year limitations period for torts other than personal injuries applicable to the civil rights suit as against the individual officials. Judge Gerry in this district has also found the two-year Tort Claims Act limitations period applicable to a

Section 1983 suit. *See Gipson vs. Township of Bass River,* 82 FRD 122 (D.N.J. 1979).

Plaintiff argues, however, that the Authority, unlike the municipalities in *Lloyd* and *Gipson,* is not a "public entity" for purposes of the Tort Claims Act, and therefore that Act's limitations period should not be borrowed.

In support for its proposition that the Authority is not covered under the Act, plaintiff points to the Authority's power to sue or be sued. NJSA 5:10-5(a) and the exclusion of "any such entity which is statutorily authorized to sue and be sued" from the Tort Claims Act's definition of "state." NJSA 59:1-3.

Blazer cites to the New Jersey Supreme Court decision in *Bell vs. Bell,* 83 N.J. 417 (1980), to support the agreement that the Authority is not a "public entity." While Blazer's argument is not without appeal, my research reveals that it has misread *Bell* and failed to account for the cases that clearly bring the Authority within the meaning of "public entity."

The Tort Claims Act defines "public entity" to mean the State, and any county, municipality, district, public authority, public agency and any other political subdivision or public body in the state. N.J.S.A. 59:1-3. The Act defines "State" to include the State and any office, department, division, bureau, board, commission or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued.

In *Bell,* the New Jersey Supreme Court held that the Delaware River Port Authority (DRPA) is a bi-state agency with the power to sue and be sued "arguably, could come within the definition of a 'public entity.' " The Tort Claims Act "is a comprehensive legislative enactment governing the immunity and liability of the state and public entities in the state" that modifies the waivers of sovereign immunity found where there is a power to sue or be sued. *See* 83 N.J. at 425. However, as a bi-state agency, the New Jersey Legislature "does not have the power to modify by unilateral action waiver of sovereign immunity set forth in the bi-state compact." See 83 N.J. at 424. In reaching its decision in *Bell,* the New Jersey Supreme

Court did not read the definition of "State" as incorporated into the definition of "public entity," as plaintiff here suggests.

In *S. E. W. Friel Company vs. New Jersey Turnpike Authority*, 73 N.J. 107 (1977), the Supreme Court of New Jersey explicitly considered the relationship between these two definitions contained in the Tort Claims Act.

The court stated, quoting Judge Breslin in *Wade v. New Jersey Turnpike Authority*, 132 N.J. Super. 92, 97-98 (Law Division 1975), "Unless a moving party can demonstrate that the Turnpike Authority is an office, department, division, bureau, board, commission or state agency, then the said exclusion contained in the definition of 'State' does not apply to the Turnpike Authority. On the other hand, the Turnpike Authority clearly fits under the definition of 'public entities," namely as a public authority." See page 116 of the *Friel* opinion.

The court relied also upon the official comment to Section 59:1-3, which stated, "The definition of 'public entity' provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to *all entities exercising governmental functions*." See 73 N.J. at 116.

The Sports Authority is similar to the Turnpike Authority in that: "The Authority is hereby constituted as an instrumentality of the State exercising and essential governmental functions." See N.J.S.A. 5:10-4.

I therefore must conclude that the New Jersey Supreme Court would find the defendant Authority to be a public entity encompassed within the New Jersey Tort Claims Act. Hence there is nothing to prevent me from borrowing the two-year Statute of Limitations of the Act for a Section 1983 action against the Authority which, for the reasons outlined earlier, is the most appropriate State Statute of Limitations.

The complaint against the Authority, having been filed nearly six years from the date the cause of action accrued, must be dismissed. However, I will not dismiss the complaint as against the individual officials as untimely, because, as Lloyd, *supra*, held, the Tort Claims Act's limitations period does not apply to suits brought against public officials.

I find the general six-year statute, N.J.S.A. 2A:14-1 most appropriate for this action against the individuals because it states a claim most analogous to an unjustified interference with business tort, as the Meyers analysis earlier indicated.

I next address the individual defendants' motion to dismiss the complaint for failure to specify the conduct of each defendant plaintiff believes caused his injury under *Rotolo vs. Borough of Charleroi*, 532 F.2d 920 (3d Cir. 1976).

The standard of review on a motion to dismiss for failure to state a claim upon which relief can be granted is whether plaintiff can prove any set of facts which would entitle it to the relief it seeks. See *Jamieson vs. Robinson*, 611 F.2d 138 (1981). However, where matters outside the pleadings are presented to the court, a Rule 12(b)(6) motion is to be treated as one for summary judgment under Rule 56.

I have concluded that the plaintiff has not pleaded a cause of action under Section 1983 arising out of the due process clause of the Fourteenth Amendment with sufficient specificity. But I will not grant summary judgment. Rather, plaintiff will have an opportunity to amend.

Section 1983 provides:

"Every person who, under cover of any statute, ordinance, regulation, custom or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The elements which plaintiff must prove in order to state a claim under Section 1983 for deprivation of property without due process are:

(1) Defendants acted under color of state law;
(2) Which action amounted to a deprivation;
(3) Of plaintiff's property; and
(4) Without due process of law.

In this point of their brief, the members of the Authority claim that the complaint fails to inform them of the actions they took on their omissions to act that constituted a breach of

duty and that allegedly deprived the plaintiff of his property without due process of law. I must agree with them.

The Third Circuit requires that civil rights complaints contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed the plaintiffs. *See Ross vs. Meagan*, 638 F.2d 646 (3d Cir. 1981).

On examination of the complaint, I find that the individual defendants are not treated as individuals, but are lumped together with the Authority as "defendants." *See Shirey vs. Bensalem Township*, 501 F. Supp. 1138, 1144 (E.D.Pa. 1980).

In the interrogatories served on plaintiff by the defendants, the only specific action or admission which is attributable to an individual defendant is the failure to certify the Workable Relocation Assistance Plan (WRAP) through submission of the DCA Forms 101 and 102. Defendants have a right to know whether plaintiff will rest his case solely on these actions.

There is also an allegation that a booklet distributed by the Authority misrepresented the benefits plaintiff might be eligible for. This booklet was obviously written or approved by some person, but the plaintiff does not specify which, if any of the defendants, did so.

However, this is the kind of information peculiarly in the possession of the defendants and not the plaintiff. Therefore, plaintiff's answers to defendants' interrogatories are not a sufficient factual basis on which to grant defendants' summary judgment.

Even though I am granting plaintiff an opportunity to amend the complaint, I feel compelled to remind them that liability under Section 1983 cannot be predicated on judicial notions of respondeat superior. *See Hampton vs. Holmesburg Prison Officials*, 546 F.2d 1077 (3d Cir. 1976).

The administrative officers of the Authority have a good faith immunity and can only be liable if they "played an affirmative role in the deprivation of the plaintiff's rights, i.e., there must be a causal link between the actions of the responsible officials named and the challenged misconduct." *See Commonwealth of Pennsylvania vs. Porter*, 642 F.2d 687, 696 (3rd Cir. 1981). *See* also *Rizzo vs. Goode*, 423 U.S. 362, 375 (1976).

While the defendants move to dismiss the complaint on the ground of vagueness, granting plaintiff an opportunity to amend its complaint is not inconsistent with the goal of specificity because it works to insure that legitimate claims be heard. *See Rotolo* cited *supra*.

In light of my decision, I do not reach plaintiff's motion for partial summary judgment or the remainder of the motions raised by the individual defendants.

I will deny these motions without prejudice to the right of the parties to renew any aspect of them if they choose to do so, after an amended complaint is filed.

Plaintiff will have 30 days from the signing of the order to file an amended complaint. If it does not do so, the entire complaint will be dismissed.

Mr. Ward, may I ask you to draw an order in conformance with my decision here this afternoon.

Decision of Judge Harold A. Ackerman dated March 1, 1982

Now, the individual defendants today argue on their present motion that they are entitled to judgment as a matter of law because the complaint fails to set forth a claim upon which relief can be granted because they are protected by a qualified immunity because the action is barred by the statute of limitations.

They have also moved for attorneys' fees, pursuant to Section 1988. Plaintiff has denied that the defendants are entitled to relief on any of these grounds, and further asserts that it is entitled to judgment because the defendants are culpable as a matter of law. Because both parties have submitted to the Court matters outside the pleadings, I will consider these motions under Federal Rule of Civil Procedure 56 standards.

On a Rule 56 motion I must give the party opposing the motion the benefit of all reasonable factual inferences, and I may grant summary judgment only if there are no genuine issues of fact.

As a moving party, or I should say, the moving party is entitled to judgment as a matter of law. See *DeLong Corporation v. Raymond International,* 622 F.2d 1135 (3rd Cir. 1980). For the reasons I will set forth in a moment, I am granting defendant's motion and dismissing plaintiff's complaint, but denying defendant's request for fees.

Today the defendants have once again raised the spector of time in this matter. On November 16, 1981, I ruled that the statute of limitations applicable to this 1983 claim was the two-year New Jersey Tort Claims Act. With respect to the Authority, and the six-year general period, N.J.S.A. 2A:14-1, with respect to the individual officials.

See *Meyers v. Pennypack Woods Home Ownership Association,* 559 F.2d 894, 901 (3rd Cir. 1977). I stated that the complaint, having been brought within six years of the date Blazer Corporation was moved out of its location, was timely as to the individual defendants.

During the hearing in the fall, none of the parties suggested any other date as the time the cause of action accrued, and I assumed the August 15, 1974 date was the day which required my analysis. Today it has been suggested that plaintiff's cause of action accrued and the six-year statute began to run at the latest as of Judge Trautwein's final order of July 16, 1974, directing plaintiff to vacate its premises and possibly as early as the November 12, 1973 order of Judge Trautwein.

While I have reconsidered my previous assumption that August 15, 1974, started the clock running, I am not persuaded by defendant's argument.

Under New Jersey law, "A plaintiff's cause of action accrues for limitation purposes when he suffers actual consequential damage or loss from the defendant's negligence." See *Rosenau v. City of New Brunswick,* 51 N.J. 130 (1968); see also *Cappadona v. Eckelmann,* 159 N.J. Super. 352 (App. Div. 1978).

In the instant case the alleged unconstitutional conduct is the failure of the defendants to assist plaintiff in relocating to make payments due it prior to plaintiff's dislocation, and to inform plaintiff of how to take advantage of the relocation services available.

If plaintiff has a cause of action under Section 1983 at all, the actionable injury arose when plaintiff was dislocated. The alleged injury to plaintiff's property right to pursue a lawful business without unjustifiable interference occurred not when the Authority acquired Blazer's property or when it set the date for displacement, but when it displaced Blazer without, according to it, all the predisplacement rights under the Relocation Assistance Acts.

Under the 1967 Act, "Displaced" means "required to vacate any real property or any tenancy therein pursuant to any lawful order or notice of any state agency. . ." N.J.S.A. 20:4-3(c).

As I read plaintiff's complaint, but for the alleged failure to comply with the acts, the Authority's taking and dislocation would have been a justifiable interference with its property right under the Eminent Domain Act. The defendants could

have given to plaintiff that which was allegedly due at anytime between the November court order and the August dislocation.

Therefore, I find that the appropriate date for marking the accrual of this cause of action is August 15, 1974. Plaintiff's complaint against the individual Authority officials is therefore timely.

Defendants also argue that they are entitled to summary judgment because the amended complaint fails to state a claim under Section 1983 against these officials. They contend that the allegations contained in the complaint are based predominantly on the oversight or supervisory responsibilities of these defendants who are the highest officials in the Authority. As such, they are not the affirmative acts required for Section 1983 actions. See *Rizzo v. Goode,* 423 U.S. 362 (1976).

The only direct affirmative act or omission alleged by the plaintiff, according to defendants, is the failure of Defendant Werblin as the Chief Executive Officer of the Authority to sign and forward the DCA assurance forms referred to as Form DCA-101-Guideform assurance with respect to P.L. 1967 C.79 and P.L. 1971 C.362, and Form DCA-102-Guideform assistance with respect to Relocation Requirements P.L. 1967 C.79 and P.L. 1971 C.362.

With respect to this allegation, defendant Werblin argues that his failure is not unlawful under the 1971 Act, or is at most a *de minimus* violation from which Blazer suffered no actionable harm.

Plaintiff defends the sufficiency of its amended complaint by pointing to numerous alleged affirmative duties and derelictions of these duties which directly caused plaintiff's loss of property.

The amended complaint includes allegations of the defendants unlawfully delegated their responsibilities under the Relocation Acts to the Department of Transportation, that the defendants failed to give the plaintiff the required 90-day written notice, that the defendants failed to obtain the approval of the DCA Commissioner of the Workable Relocation Assistance Plan (WRAP), and that the defendants failed to incorporate into the WRAP all the necessary policies, and that

the defendants had direct or constructive knowledge of the unique circumstances of the plaintiff's business, qualify it as a hardship case.

Plaintiff asserts that these allegations bring the claim within the requirements of Section 1982, under *Hague v. CIO,* 307 U.S. 496 (1939) and *Black v. Stephens,* 662 F.2d 181 (3rd Cir. 1981).

My review of all the papers filed on these motions and on the earlier summary judgment motions leads me to believe that the constitutional questions presented are difficult, and to some extent, novel. Namely, this case raises the issue whether every violation of state law also constitutes a constitutional or deprivation of due process. See *U.S. v. Jiles,* 658 F.2d 194 (1981). Because this is a novel question, I will consider the other avenues of argument raised by the parties first in order to obviate, if possible, the need to reach it.

Section 1983 provides in pertinent part:

> "Every person who, under color of law subjects or causes to be subjected, any. . .person within the jurisdiction of the United States to the deprivation of any rights. . .secured by the Constitution and laws shall be liable to the party injured in an action at law or suit in equity. . ."

I must first determine whether, assuming arguendo, that the alleged actions constitute constitutional deprivations, these defendants subjected or caused to be subjected the plaintiff to such deprivations.

This clause in Section 1983 has been construed to include only a person's own conduct or participation in a pattern of violation by virtue of knowledge, acquiescence, support and encouragement.

See *Rizzo v. Goode, supra,* and *Black v. Stephens, supra.*

Plaintiff's principal allegations concern the failure of defendants to inform plaintiff as to the availabilty and professing of relocation benefits. I have not considered the alleged denial of benefits to the part of liability phase of this case for the reason that plaintiff never applied for them. The process that was due

plaintiff and which allegedly was denied it was the accessibility to the application process.

The facts presented on these motions viewed most favorably to the plaintiff show the following:

Plaintiff received a DOT pamphlet called "If I Must Move," which failed to incorporate all the requisite information; for example, it failed to specify that the hardship cases could, upon application, receive advance payments.

Plaintiff was never presented with potential relocation sites or with financial or technical assistance in adopting any relocation site to fit its special needs.

The WRAP prepared by DOT on behalf of the Authority and never certified (which allegation I will address in a moment) did not contain a proper eviction policy.

I find that the acts of which plaintiff complains, assuming that they are constitutional torts, were the acts of employees and agents of these defendants. The defendants are essentially the Board of Trustees for the Authority.

The plaintiff has alleged only that the powers of the Authority vest in them, that the responsibilities under the Relocations Acts are mandatory and that they had direct or constructive knowledge of the unique circumstances of plaintiff's business. To hold these defendants liable for the actions of the Authority, or DOT employees, under these circumstances, is to base liability, in my judgment, on the Doctrine of *respondeat superior.*

A liability under Section 1983 cannot be predicated on notions of *respondeat superior.* See *Hampton v. Holmesberg Prison Officials,* 546 F.2d 1077 (3rd Cir. 1976).

Liability under Section 1983 can be predicated on the failure of high officials to properly supervise their employees, but only where there is found a policy on the part of high officials of encouragement and acquiescence in the constitutional violations of their employees. See *Commonwealth of Pennsylvania v. Porter,* 659 F.2d 306 (3rd Cir. 1981). However, such is not the case here, even when the facts are viewed under summary judgment standards.

This is not the case of a police chief who conveniently ignores citizens' complaints of the use of excessive force by

police officers brought to his or her attention time after time. See *Porter, supra.* Here, even if defendants knew that the nature of plaintiff's business involved unique structural circumstances, there are no facts in the record that even hint that these defendants were not entitled to assume that their employees were properly administering to plaintiff's needs. *C.F. Watson v. Interstate Fire Casualty Company,* 611 F.2d 120 (5th Cir. 1980).

Therefore, defendants are not persons who have subjected or caused to be subjected the plaintiff to a deprivation of any rights to relocation assistance, even assuming these rights are constitutionally protected.

If the allegations that are not clearly predicated on supervisory responsibilities, two must be dismissed on the basis that the undisputed evidence proves that the defendants did not violate the Relocation Acts. Plaintiff has complained that the defendants unlawfully delegated its responsibilities under the Acts to the Department of Transportation. However, the Act itself anticipates that state agencies will share resources and expertise in implementing and carrying relocation programs. N.J.S.A. 20:4-11 provides in part:

> "In order to prevent unnecessary expense and duplication of functions and to promote uniform and effective administration of relocation assistance programs for displaced persons, the Commissioner may authorize any taking agency to . . . carry out its functions under this Act through any state agency or instrumentality having an established organization for conducting relocation assistance programs."

On April 25, 1973, the Authority, by Defendant Werblin, entered into a contract with the New Jersey Department of Transportation which has "the required organization and the special professional expertise" to accomplish relocation assistance on behalf of the Authority.

The act by Defendant Werblin of contracting with the Department of Transportation was therefore lawful. Under the contract, the DOT was to "exclusively provide all areas of

relocation assistance" while the Authority was to handle the legal acquisition, condemnation and eviction matters. Even though, the Authority was ultimately responsible for the actions of the Department of Transportation personnel as its agents. See DCA Regulations, Chapter 2, Paragraph 3. These defendants are not liable on this basis under Section 1983 for the negligence of field officers and DOT employees for the reasons already annunciated.

I have also determined that the notice of dispossession provided to plaintiff was sufficient as a matter of law. While the DCA regulations require 90-day written notice, I find that the November 12, 1973, court order entered by Judge Trautwein which specified February 1st, 1974, as the date by which plaintiff was to vacate the premises, constitute more than adequate notice.

Actually, plaintiff was on notice for more than nine months, when one takes into consideration the extensions consented to in writing by the Authority and the amended orders of Judge Trautwein.

I therefore find that no state law violation incurred in this regard, and accordingly, no constitutional violation.

The plaintiff's complaint, therefore, falls or stands on its allegation that Defendant Werblin violated Blazer's due process rights by failing to submit the DCA Forms of Assurance 101 and 102. Defendants suggest that the 1971 Act does not make this a legal requirement, although the 1967 Act does. See N.J.S.A. 52:31-B-5, and that therefore the failure to certify cannot be a basis for Section 1983 liability. I do not agree. The WRAP itself specifies with respect to these assurances:

> "The Sports and Exposition Authority attorney will separately arrange as an integral part of this plan to submit to the Commissioner of Community Affairs the assurances required in form DCA-101-Guideform assurance with respect to P.L. 1967 C.79 and P.L. 1971 C.362—and DCA Form 102-Guideform assistance with respect to relocation requirements P.L. 1967 and P.L. 1971 C.362.

This is in accordance with DCA regulations which sets out in its introductory paragraph that "governmental agencies are subject to the relocation provisions of the Relocation Assistance Acts of 1967 and 1971 (P.L. 1967, Chapter 79, and P.L. 1971, Chapter 362). These regulations are promulgated pursuant to the legislation. See N.J.S.A. 52:31B-10 and N.J.S.A. 20:4-10. I therefore find that the certification by the Chief Executive Officer of the taking agency, in this case, Defendant Werblin, is required under the Acts.

I am therefore faced with determining whether this violation by defendant of state law rises to the level of constitutional error.

In *Jiles*, cited *supra*, as I pointed out earlier during the colloquy, the Third Circuit began to shape the contours of this area of constitutional law. When Judge Hunter, speaking for the court, said:

> "In determining whether the violation of a particular state law deprived a defendant of his due process rights . . . we must ascertain whether the state law directly conferred a substantive right on the defendant or merely created an administrative plan to help the state regulate its officers' conduct." See page 200 of that opinion.

At issue in *Jiles* was a state procedure to protect juveniles from having their criminal records released to the public. The statute included a court procedure for intra-law enforcement agency relief. The Third Circuit, holding that the use of a photograph in a photo spread identification without having obtained a court order did not violate the appellee's constitutional rights, stated:

> "This safeguard, while helpful to the state in ensuring that such records would not be released to the general public, did not create a property interest on behalf of the appellee."

Here the statute created a procedure to protect dislocated persons and business concerns from unfair or inequitable relocation. See N.J.S.A. 20:4-2.

The DCA forms 101 and 102 are the same kind of procedural safeguard as was at issue in *Jiles*. There can be no doubt that a WRAP was promulgated by DOT under contract to the Authority, and that it was implemented to some degree at least. The WRAP was submitted to the Commissioner of DCA pursuant to the Acts who found that "the manner in which you propose to relocate persons displaced and the resources available for their relocation comply with the requirements of the Relocation Assistance Law of 1971 and the regulations promulgated thereunder." See letter from Commissioner Kramer to James Hyde, dated July 20th, 1973. The Commissioner concluded the letter by saying that the approval of the WRAP is contingent on the submission of these forms.

For summary judgment purposes, the evidence does not show that the forms were ever submitted. However, I do not find that plaintiff had a property interest in this safeguard. It was the intention of the Acts that relocation of plaintiff proceed pursuant to a WRAP, but one was prepared for the Authority and implemented. The signature of Defendant Werblin on these forms can only be deemed part of "an administrative plan to help the state regulate its officers' conduct." See *Jiles* at page 200.

To say that but for these forms, the field officers would have properly informed plaintiff of its rights under the Acts and but for this, plaintiff would not have been unprepared financially and physically to relocate is to travel down the same supervisory road covered before.

I find that the Defendant Werblin did not commit a constitutional tort.

In sum then, I have determined that the amended complaint was filed timely, but that it fails to state a claim cognizable under Section 1983 against these defendants because, one, these defendants did not personally perform the administrative functions of informing the plaintiff of available relocation assistance benefits, two, they did not as supervisor acknowledge, encourage or support a pattern or practice of constitutional violations; and three, Defendant Werblin's delegation of the relocation program responsibilities to DOT was lawful;

four, Defendant Werblin's violation of the certification requirement does not constitute a constitutional violation.

However, I will not grant attorneys' fees to the defendants. The Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. Section 1988 provides that a court "in its discretion may allow the prevailing party. . . a reasonable attorneys' fee as part of the costs."

The term "prevailing party" includes defendants, but Congress has indicated that "defendants should be entitled to attorneys' fees only if the action is vexacious and frivolous, or if the plaintiff instituted solely to harrass or embarrass the defendant."

See Note, 80 Columbia Law Review 346, 354 (1980). See also *Christiansburg Garment Company v. EEOC*, 434 U.S. 412, 421, which I note is a case decided prior to the promulgation of Section 1988, but the same standard is utilized under 1988 as is utilized under the EEOC.

As I have already stated, plaintiff's complaint raised difficult and unsettled questions of constitutional law.

In my discussion, the equities do not counsel granting fees to these defendants.

Mr. Nowak, I will ask you to prepare an appropriate order in conformance with my determination here today. Thank you.

MR. NOWAK: Yes, your Honor. Thank you.

Judgment of the Court of Appeals for the Third Circuit dated December 2, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5239

BLAZER CORPORATION,

Appellant

—vs.—

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. MCCRANE, and "JOHN DOES," said names being fictitious

(D.C. Civil No. 80-2587)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY - NEWARK

ARGUED NOVEMBER 19, 1982

Before:

GIBBONS, HIGGINBOTHAM and BECKER,
Circuit Judges.

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Attorneys for Appellees, Werblin, Serraino, Foley, Kugler, Lewis and McCrane

JUDGMENT ORDER

Blazer Corporation appeals from a final order granting summary judgment against it on its Section 1983 complaint against the New Jersey Sports and Exposition Authority and certain of its officials. Since the complaint fails to state a cause of action for violation of that section, it is

ORDERED, ADJUDGED and DECREED that the judgment be and is hereby affirmed.

Costs are taxed in favor of appellees.

BY THE COURT,

/s/ JOHN GIBBONS

Circuit Judge

Attest:

/s/ SALLY MRVOS

Sally Mrvos, Clerk

Dated: Dec. 2, 1982

Order Denying Motion for Hearing En Banc dated December 29, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5239

BLAZER CORPORATION,

Appellant,

—VS.—

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. MCCRANE, and "JOHN DOES,", said names being fictitious,

(D.C. Civil No. 80-2587)

SUR PETITION FOR REHEARING

Present:

SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS,
HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no

judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ JOHN J. GIBBONS
Judge

Dated: Dec. 29, 1982

NO. 82-1614

Office - Supreme Court, U.S.
FILED
MAY 23 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BLAZER CORPORATION,

Petitioner,

v.

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. McCRANE and "JOHN DOES," said names being fictitious,

Respondents.

BRIEF OF RESPONDENT NEW JERSEY SPORTS AND EXPOSITION AUTHORITY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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V. ANNE GLYNN MACKOUL.

Dated: May 12, 1983

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

Statement of Questions Presented for Review

Respondent New Jersey Sports and Exposition Authority ("Respondent Authority") notes that of the four issues set forth by Petitioner Blazer Corporation ("Petitioner") in its Statement of Questions Presented for Review, only one (the third) was reached and decided below by the Court of Appeals for the Third Circuit. It was not necessary for such Court to resolve the other three issues now presented by Petitioner because of that Court's determination, upon a review of the factual record in this case and upon the application of well-established precedent in this Court and in the Third Circuit and other Circuits, that Petitioner had simply failed to state a cause of action under 28 U.S.C. §1983.

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NO. 82-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BLAZER CORPORATION,

Petitioner,

v.

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. McCRANE and "JOHN DOES," said names being fictitious,

Respondents.

BRIEF OF RESPONDENT NEW JERSEY SPORTS AND EXPOSITION AUTHORITY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent New Jersey Sports and Exposition Authority respectfully prays that the Petition of Blazer Corporation for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Constitutional Provisions, Statutes and Regulations Which the Case Invokes

The following relevant statutes, in addition to those included in the appendix to the Petition, are set forth verbatim in the appendix hereto: N.J. Stat. Ann. §2A:14-1 (West 1982); N.J. Stat. Ann. §20:4-4 (West 1982); N.J. Stat. Ann. §20:4-7 (West 1982); N.J. Stat. Ann. §20:4-10 (West 1982); N.J. Stat. Ann. §20:4-11 (West 1982); N.J. Stat. Ann. §20:4-18 (West 1982); N.J. Stat. Ann. §20:4-19 (West 1982); N.J. Stat. Ann. §52:31B-8 (West 1982); N.J. Stat. Ann. §59:2-2 (West 1982); N.J. Stat. Ann. §59:3-1 (West 1982).

Statement of the Case

The case which Petitioner seeks to have this Court review is one peculiar in its facts. Contrary to the requirements of Sup. Ct. R. 21.1(g), Petitioner, in its Statement of the Case, does not set forth "facts material to the consideration of the questions presented." Rather, Petitioner's Statement of the Case contains little more than a series of legal conclusions and legal arguments unsupported by the factual record in this case, a factual record which caused the Court of Appeals for the Third Circuit to dismiss Petitioner's Complaint for failure to state a cause of action.

Petitioner alleges that it was denied relocation benefits when property which it occupied as a tenant was condemned for the Meadowlands Complex. In fact, Petitioner was repeatedly offered relocation assistance pursuant to the New Jersey Statutes, which Petitioner acknowledges thoroughly protect the rights of relocatees (Petition, at 3), but repeatedly refused such assistance. If Petitioner failed to receive assistance, it was, as the record clearly demonstrates, because of Petitioner's *own* efforts to frustrate the condemnation and relocation, by

studied avoidance and refusal to cooperate. Moreover, the statutory violation of which Petitioner complains clearly does not confer substantive rights of constitutional dimension. There is no federal question or denial of constitutional rights presented by the facts of this case, much less any question of special importance or of discord among the federal courts of appeal.

The Parties

Petitioner is a corporation of the State of New Jersey currently having its principal office at 700 21st Avenue, Paterson, New Jersey (R. 9a).* Prior to August 15, 1974, Petitioner was a tenant leasing approximately 10.35 acres of land (RA. 6a) and buildings at 400 Paterson Plank Road, East Rutherford, New Jersey, where Petitioner was engaged in the manufacture of air conditioning systems (the "Premises") (R. 10a). The owner of the land and buildings which Blazer leased—Blazer Realty Corporation ("Blazer Realty"), a corporation wholly owned and controlled by Benjamin Blazer, the principal of Petitioner—is not a party to this action (R. 303a).

Respondent Authority is a body politic and corporate of the State of New Jersey established in the Department of Community Affairs and having its principal office at the "Meadowlands Sports Complex" in East Rutherford, New Jersey (R. 73a). Created by State legislation enacted in May of 1971, N.J. Stat. Ann. §5:10-1 *et seq.* (West 1982) (P.L. 1971, c.137), Respondent Authority is authorized by N.J. Stat. Ann. §5:10-5(m) (West 1982) to acquire land and other property by the power of eminent domain for the purposes of constructing in and about East

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* References in this Brief to materials contained in the two volume appendix below entitled "Appendix on behalf of Plaintiff-Appellant," shall be designated by the abbreviation "R." and the number of the page therein to which reference is made. References to materials contained in the appendix below entitled "Appendix on behalf of Defendant-Respondent, New Jersey Sports and Exposition Authority" shall be designated by the abbreviation "RA." and the number of the page therein to which reference is made.

Rutherford, New Jersey a complex for the presentation of sporting and similar events.

The individual Respondents were officials of Respondent Authority at the time of the action of which Petitioner complained (R. 70a).

The Condemnation Proceedings

In 1971 and 1972, pursuant to the directive contained in N.J. Stat. Ann. §5:10-6 (West 1982), Respondent Authority commenced the planning for the construction of the Meadowlands Complex, including the determination of how much and which property would have to be acquired. Respondent Authority concluded that the property Petitioner occupied as tenant was necessary to construct the Meadowlands Complex (RA. 5a).

By letter dated June 12, 1972, Respondent Authority first informed Petitioner that, pursuant to statute, its appraisers would be making an inspection of the Premises in connection with the acquisition of such property by condemnation for the proposed Meadowlands Complex (RA. 6a). Although Petitioner initially refused to allow the appraisal to be conducted (RA. 4a), the property was eventually appraised in the amount of $1,115,000.00 and on February 28, 1973, Respondent Authority sent to Petitioner a written offer to acquire the Premises (RA. 5a).

On March 20, 1973, in accordance with N.J. Stat. Ann. §20:3-1 *et seq.* (West 1982), Respondent Authority filed against Petitioner a Complaint in Condemnation and a Declaration of Taking as to the Premises and deposited with the Clerk of the Superior Court of the State of New Jersey, pursuant to N.J. Stat. Ann. §20:3-18 (West 1982), the amount, revised per a reconsideration of the acreage, of $1,330,395.00 (R. 29a to 30a).

In June 1973, Respondent Authority filed a Notice of Motion in Superior Court of New Jersey seeking an order requiring Petitioner and Blazer Realty to vacate the Premises by November 1, 1973; counsel for both Petitioner and Blazer Realty filed a cross-motion seeking to

withdraw the monies deposited with the Superior Court (R. 569a).

On November 12, 1973, following numerous conferences between counsel and the court, the Honorable Theodore W. Trautwein, J.S.C. entered a Consent Order allowing for withdrawal by and payment to Petitioner of all monies deposited, transferring ownership of the Premises to Respondent Authority, and requiring the payment by Petitioner to Respondent Authority of monthly rental until Petitioner vacated the Premises (the "Consent Order") (R. 569a to 574a). Along with all other parties, Petitioner consented to this Order in writing (R. 574a). Paragraph 12 of the Consent Order states:

> The defendant Blazer Corporation (tenant in possession) having specifically agreed to vacate all lands and premises which they presently occupy and which are the subject of these proceedings no later than February 1, 1974, said date shall not be extended without consent of the [Respondent Authority], and said [Petitioner] shall vacate said lands and premises on or before said date in the absence of such consent.

(R. 573a).

By letter dated December 12, 1973, Respondent Authority consented to Petitioner's remaining in possession of the Premises until May 1, 1974 in accordance with the terms provided for in the Consent Order (R. 575a). By letter dated April 23, 1974, Respondent Authority granted an additional extension until June 1, 1974 (R. 576a). In spite of the fact that Respondent Authority had consented to Petitioner's requests for extensions aggregating four months beyond the terms of the Consent Order, Petitioner did not vacate and Respondent Authority again moved before the Superior Court of New Jersey for an Order declaring Petitioner to be in violation of the Consent Order as modified, which Order was entered on June 20, 1974 (the "June 20th Order") (R. 577a to 579a). The June 20th Order required Petitioner to vacate its rear building by June 24, 1974 and its front office building by July 1, 1974,

and, in the event of non-compliance, authorized the Sheriff of Bergen County to take the necessary steps to guarantee possession of the Premises to Respondent Authority (R. 578a). The June 20th Order also established per diem fines if it were not followed (R. 579a). The dates established in the June 20th Order were further extended, by Order of the Court dated July 16, 1974 (R. 608a), to August 15, 1974 with the proviso that, if Petitioner had not vacated by August 15, 1974, Respondent Authority could enter the Premises and commence demolition "without further Order of this Court" (R. 610a).

The Relocation Proceedings

In April of 1973, and pursuant to N.J. Stat. Ann. §20:4-11 (West 1982), Respondent Authority entered into an agreement with the New Jersey State Department of Transportation ("DOT") whereunder the DOT agreed to formulate, process for approval with the New Jersey Department of Community Affairs ("DCA") and implement a Workable Relocation Assistance Plan ("WRAP") on behalf of Respondent Authority (R. 447a to 452a). In accordance with the DOT/Authority Agreement, the DOT did formulate and implement the WRAP (R. 480a to 568a), which WRAP was substantively approved by the DCA (R. 455a). Also, in accordance with the DOT/Authority Agreement, and in order to implement the WRAP, the DOT assigned to an office established on the Meadowlands Complex site in East Rutherford an experienced office staff consisting of at least four full time relocation representatives and a secretary, with additional staff as needed (R. 582a).

On May 9, 1973, the DOT sent a letter to Blazer Realty notifying it of the existence of the relocation office (R. 459a). This letter was received by Petitioner on May 10, 1973 (RA. 11a). Enclosed with the letter was a copy of the information Booklet entitled "If I Must Move . . ." (R. 559a to 567a), which informed Petitioner that:

> When the State's Relocation Representative contacts you, he will explain the various benefits and serv-

> ices that are available to you and should you desire, he will assist you in developing a personalized relocation plan.

(R. 560a).

During May 1973, the relocation representatives assigned to implement the WRAP had commenced personal contact with each of the owners and tenants of property subject to the WRAP, including Petitioner (R. 32a). John Racanelli, the relocation representative assigned to Petitioner, made initial contact with Petitioner on May 17, 1973 (R. 33a, ¶4; R. 583a, ¶4, R. 612a). As the log sheet records required of and kept by Racanelli show, Racanelli met with Benjamin Blazer in May of 1973 for several hours and explained the relocation process (R. 33a, ¶4; R. 583a, ¶4; R. 612a). In June, Racanelli met with Petitioner's attorney and explained the relocation assistance procedures to him (R. 33a, ¶4; R. 583a, ¶4; R. 612a). In each of these meetings, Racanelli offered his assistance as a relocation representative to Petitioner and advised that he would need access to the Premises in order to assess the nature of the move and the requirements of Petitioner in relocating (R. 33a to 34a; R. 583a to 585a; R. 612a to 622a).

Racanelli's log sheets indicate that Racanelli initiated approximately thirty contacts, or efforts to contact, Benjamin Blazer and/or Petitioner's attorney, during the fifteen months from the May 9, 1973 letter to the date Petitioner's movers commenced the move (R. 612a to 626a). Racanelli's offers of assistance were refused by Petitioner, many phone calls were not returned (R. 616a), and he was not allowed access to the Premises so as to be able to assess Petitioner's physical needs for a new facility or to provide the requisite data to movers. Many other contacts were attempted or made with various managers or supervisors employed by Petitioner (R. 612a to 622a). Significantly, the only contacts initiated by Petitioner (involving the eleventh hour estimates of the movers) evoked Racanelli's immediate response, including his hand-delivery of the necessary documents to Trenton and back (R. 612a to 618; R. 620a).

Benjamin Blazer's reluctance to participate in the relocation process until the eleventh hour may be explained by the position he took in the proceedings before Judge Trautwein, wherein he indicated his belief that the Meadowlands Complex would not receive funding (R. 34a, ¶5; R. 584a, ¶5). Despite the November 12, 1973 Consent Order directing Petitioner to vacate the Premises by February 1, 1974, Benjamin Blazer, during February 1974, advised Racanelli that Petitioner was considering building a new facility elsewhere and since such building would take at least six months to construct, moving estimates were not yet necessary (R. 614a). And, while the November 12th Consent Order had been modified to allow Petitioner to remain in possession until only May 1, 1974, this notion was repeated to Racanelli by Benjamin Blazer on March 22, 1974, this despite Racanelli's and Benjamin Blazer's counsel having previously discussed the ramifications of the existing Consent Order, as modified, directing Petitioner to vacate the Premises by May 1, 1974 (R. 614a).

On May 22, 1974, more than a year after the initial contact and well after the original date to vacate set by Judge Trautwein, Racanelli was finally permitted by Petitioner to meet with Petitioner's representatives to discuss the machinery on the Premises (R. 616a). On June 14, 1974, Benjamin Blazer indicated to Racanelli that two relocation sites were under construction by Petitioner, but he refused to provide Racanelli with addresses (R. 618a). On June 19, 1974, Racanelli was informed that Petitioner had arranged to enter into a lease agreement for premises at 100 Orchard Street, Hackensack, New Jersey, several miles away, and Racanelli, along with personnel from Petitioner, went to the site (R. 618a). Such personnel advised Racanelli that the only matter not completed to effectuate the tenancy was that Benjamin Blazer had not yet signed the lease, which was "sitting on his desk" (R. 594a to 596a). Petitioner then advised Respondent Authority that Petitioner needed some additional time to effect an orderly move (R. 622a). The

Meadowlands Complex engineer, by letter dated June 21, 1974 (almost five months past the date upon which Petitioner had agreed to vacate) informed Respondent Authority that the Authority could accommodate Petitioner by allowing Petitioner to remain in possession until August 15, 1974, but that Petitioner's remaining on the site after that date would cause serious delays in the construction of the Meadowlands Complex, and would entail major construction expenses and lost revenues (R. 606a to 607a). On July 16, 1974, on motion of Respondent Authority, Judge Trautwein amended the June 20th Order and allowed Petitioner to remain until August 15, 1974, but also ordered that the Authority could enter onto the land and commence demolition without further order of the Court (R. 609a to 610a).

On July 16, 1974, two moving estimates were given by personnel of Petitioner to Racanelli, who immediately returned them as lacking necessary information (R. 594a). On July 26, 1974, Petitioner's representatives reported to Racanelli that the lease for 100 Orchard Street was still on Benjamin Blazer's desk awaiting his signature (R. 596a). On August 1, 1974, three moving estimates were picked up by Racanelli and were hand-delivered to Trenton for review (R. 596a).

On August 12, 1974, the bid of Main Trucking & Rigging was authorized for the move to Hackensack (R. 586a, ¶9) and the authorization letter to that effect was hand delivered by Racanelli to Petitioner, whereupon Racanelli was again informed that Benjamin Blazer had not yet signed the lease for the facility in Hackensack, as he was vacationing in Florida (R. 596a). Nonetheless, personnel of Petitioner arranged with Main Trucking for the move, to commence on August 14, 1974 (R. 598a). Racanelli met with representatives of Petitioner and Main Trucking on August 13, 1974 at the Premises to discuss the move (R. 598a). The loading of equipment and machinery onto trucks under the supervision of personnel of Petitioner began on August 14, 1974 (R. 598a). When the movers for Main Trucking and personnel of Petitioner arrived at the

Premises on August 15, 1974 to continue the move, they were confronted with locked gates and a sign declaring that Petitioner had filed for bankruptcy (R. 598a).

The Voluntary Bankruptcy

On August 16, 1974, Petitioner filed a Voluntary Petition for Reorganization under Chapter XI of the Bankruptcy Act and obtained an Order appointing a Receiver (R. 132a to 135a) and imposing restraints against Respondent Authority from "interfering with the orderly removal of the assets of the Debtor corporations to a new location . . . [and] from commencing demolition of all buildings and other improvements thereon" (R. 134a to 135a). Respondent Authority moved to dissolve the restraints, and the Premises were finally vacated on September 5, 1974 (RA. 9). Under the direction of Petitioner's Trustee in Bankruptcy, the machinery was moved to and stored in the warehouse of Main Trucking at an additional cost to Respondent Authority of $108,000.00 (RA. 10a).

At no time did the Bergen County Sheriff evict Petitioner from the Premises. Petitioner had itself submitted the moving bids, contracted with the approved mover, and commenced with the move prior to the filing of its Voluntary Petition under Chapter XI. In connection with the voluntary bankruptcy, the Trustee in Bankruptcy for Petitioner completed the move pursuant to a Consent Order. Petitioner is now operating in Paterson, New Jersey.

The Present Litigation

On August 12, 1980, Petitioner filed a Complaint in the United States District Court for the District of New Jersey under 28 U.S.C. §1331(a) and 42 U.S.C. §1983 (R. 9a to 21a), alleging that Respondents had violated certain New Jersey statutes giving rise to a cause of action under 42 U.S.C. §1983, this allegedly by (i) evicting Petitioner from the Premises at which Petitioner was a tenant "without making available to [Petitioner] all the expenses and payments to which it was entitled . . ." (R. 12a, ¶14); (ii) failing to inform Petitioner before its eviction that Peti-

tioner was "eligible for advance payments of relocation assistance allowances . . ." (R. 12a, ¶16); (iii) failing to "formulate or obtain the needed certification or certifications with regard to the Workable Relocation Assistance Program" (R. 14a, ¶20); (iv) failing, among other things, (a) to inform Petitioner of specific relocation benefits, (b) to inform Petitioner of current information as to comparable commercial properties, (c) to determine the extent of Petitioner's need for assistance, (d) to inform Petitioner about eviction policies, and (e) to offer prospective places for relocation (R. 14a, ¶22); (v) failing to give Petitioner 90-day written notice prior to dislocation (R. 15a, ¶24); (vi) failing to comply with eviction procedures (R. 15a, ¶27); (vii) failing to pay for losses of tangible personal property (R. 16a, ¶29); and (viii) failing to offer or pay for reasonable expenses in searching for a replacement business (R. 17a, ¶32). On October 23, 1980, Respondents filed an Answer generally denying the material allegations of the Complaint and setting forth specific affirmative defenses (R. 22a to 25a).

On September 17, 1981, Petitioner filed a motion for partial summary judgment against Respondents, seeking to establish their liability as a matter of law (R. 446a). On October 8, 1981, the individual Respondents filed a cross-motion for summary judgment under Fed.R.Civ.P. 56, asserting, *inter alia*, that Petitioner had failed to state a cause of action under 42 U.S.C. §1983 (R. 478a). On October 16, 1981, Respondent Authority also filed a cross-motion for summary judgment, asserting that Petitioner's claim against it was barred by the applicable statute of limitations (R. 755a). The motions were consolidated and heard by Judge Ackerman, J.D.C. on November 16, 1981 (R. 760a to 808a).

On December 7, 1981, Judge Ackerman issued an Order granting Respondent Authority's cross-motion for summary judgment on the basis that Petitioner's claim against Respondent Authority was barred by the applicable statute of limitations and allowing Petitioner to amend its

Complaint against the individual Respondents (R. 809a to 810a).

On January 6, 1982, Petitioner filed an Amended Complaint (R. 830a to 873a). On January 26, 1982, the individual Respondents again moved for summary judgment, contending, as to the Amended Complaint, that Petitioner had still failed to allege a cause of action under 42 U.S.C. §1983 as to the individual Respondents, and that, in any event, the individual Respondents were entitled to a qualified immunity (R. 896a). Petitioner filed a cross-motion for summary judgment (R. 898a). The motions were heard on March 1, 1982 (R. 903a to 955a), at which time Judge Ackerman rendered his decision from the bench denying Petitioner's cross-motion for summary judgment, and granting the individual Respondents' motion for summary judgment. Among other things, Judge Ackerman, having reviewed all of the allegations made by Petitioner in its Amended Complaint, found, (i) that, under Supreme Court and Third Circuit decisions, a person may be found liable under §1983 only for his "own conduct or participation in a pattern of violation by virtue of knowledge, acquiescence, support and encouragement" (R. 945a) and not under the doctrine of *respondeat superior* (R. 947a); (ii) that the notice of dispossession provided to Petitioner, particularly the orders in condemnation (R. 949a to 950a), was sufficient notice as a matter of law; (iii) that Respondent Authority had lawfully delegated to the DOT, under N.J. Stat. Ann. §20:4-11 (West 1982), the responsibility to formulate and implement a satisfactory relocation plan; and (iv) that Petitioner's claims reduce to the alleged failure on the part of Respondent Authority to file certification forms (DCA Forms 101 and 102) on behalf of Respondent Authority, which alleged failure would only be a violation of state law that would not rise to the level of constitutional error and therefore would not give rise to liability under 42 U.S.C. §1983. (Petition, 32a to 34a).

By Judgment dated December 2, 1982, the Court of Appeals for the Third Circuit affirmed the judgments

of the District Court, not on the non-substantive grounds upon which the District Court had dismissed Petitioner's claims against Respondent Authority and the individual Respondents,* but because Petitioner's complaint failed to state a cause of action under 42 U.S.C. §1983.**

The judgment of the Court of Appeals for the Third Circuit reads in its entirety as follows:

> Blazer Corporation appeals from a final order granting summary judgment against it on its Section 1983 complaint against the New Jersey Sports and Exposition Authority and certain of its officials. Since the complaint fails to state a cause of action for violation of that section, it is
>
> ORDERED, ADJUDGED and DECREED that the judgment be and is hereby affirmed.
>
> Costs are taxed in favor of appellees.

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* Contrary to Petitioner's misrepresentation of the record, "the Courts below" did not grant summary judgment dismissing all Respondents "on non-substantive grounds, including defenses of the statute of limitations (with respect to Respondent Authority only) and non-liability for the acts of subordinates under the doctrine of respondeat superior" (Petition, at 2 to 3). While these grounds may have formed the basis for the judgments of the District Court, they clearly did not form the basis for the judgment of the Court of Appeals for the Third Circuit.

** Contrary to Petitioner's further misrepresentation of the record, there is nothing "cryptic" about the judgment of the Court of Appeals for the Third Circuit (Petition, at 8). Not only is the language of the Court's decision clear (in dismissing Petitioner's complaint for failure to state a cause of action) but at oral argument on November 19, 1982, the panel members clearly indicated, on a number of occasions, as Petitioner's counsel well knows, that the statute of limitations issue, the *respondeat superior* issue, and the *Parratt* v. *Taylor* [451 U.S. 527 (1981)] issue did not have to be reached if the Court were to find, as it ultimately did, that Petitioner had failed to state a cause of action under 42 U.S.C. §1983. Indeed virtually the entire thrust of the panel's questioning of Petitioner's counsel was addressed to this latter issue.

Summary of Argument

Discretionary review, by writ of certiorari, of the decision of a federal court of appeals is appropriately limited, by Sup. Ct. R. 17, to situations where "special and important reasons" exist, as illustrated in the Rule. No such situation exists in the present case, a case which on its unique facts warrants the action of the Court of Appeals for the Third Circuit below in dismissing Petitioner's complaint for failure to state a cause of action under 42 U.S.C. §1983. Given the facts of this case, even when construed in favor of Petitioner, as did the Courts below, this Court should not exercise its discretion to consider legal issues which are not necessary to a disposition of this action and which do not have the far-reaching consequences which Petitioner suggests.

The decision of the Court below that Petitioner's complaint fails to state a cause of action under 42 U.S.C. §1983 involves essentially an application of the unique facts of this case to well-established law. The violation of state law alleged by Petitioner simply does not rise to constitutional dimension.

Further, the statute of limitations issue, extensively referred to by Petitioner, does not warrant discretionary review by this Court: (i) the issue is not necessary to the disposition of this matter, (ii) the issue therefore was not decided by the Court of Appeals below, (iii) consequently, there is no conflict between the Court of Appeals for the Third Circuit and other courts of appeal as to this issue, (iv) by the terms of the federal statute which prescribes applicable limitation laws in civil rights cases, conformity with state law rather than federal uniformity is the standard, and (v) the statute of limitations applied by the District Court in this matter (albeit mooted by the decision of the Court of Appeals for the Third Circuit) is not inconsistent with federal law and is insufficient, in any case, to warrant invocation of the Court's power of supervision.

ARGUMENT

I. This matter does not warrant invocation of this Court's discretionary jurisdiction to review causes by writ of certiorari, such review being appropriately limited to situations where "special and important reasons" exist.

Sup. Ct. R. 17 requires that discretionary review by this Court, by writ of certiorari, "will be granted only when there are special and important reasons therefore." No such special and important reasons, as illustrated in the Rule, are present in this case, which was properly decided by the Court of Appeals for the Third Circuit upon application of well-established law to unique facts. *See* discussion Point II, *infra*. The Court of Appeals for the Third Circuit did not render a decision in conflict with decisions of other federal courts of appeals, did not decide a federal question in a way in conflict with a state court of last resort, did not depart from the accepted and usual course of judicial proceedings such as to call for exercise of this Court's power of supervision, did not decide an important question of federal law which has not, but should be, settled by this Court, nor did it decide a federal question in a way in conflict with applicable decision of this Court. Rather, it routinely and summarily dismissed Petitioner's claims as insufficient under 42 U.S.C. §1983.

While for individual litigants the facts of their respective cases may have practical importance, this is not the type of "special and important" reason to which Rule 17 speaks. Even if, contrary to the record, there was room for dispute concerning the legal sufficiency of the facts of this case, certiorari would be inappropriate.

> This [certiorari] is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evalu-

> ation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rules of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations."

National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U.S. 498 (1951).

Although Petitioner suggests that "a conflict among the Circuits exists with respect to the Tort Claims Act statute of limitations issue, which should be resolved by this Court" (Petition, at 11), the decision below of the Court of Appeals for the Third Circuit is not in conflict with the decision of any other federal court of appeals in this matter.* Contrary to the misleading implication in the Petition, the Third Circuit never decided the limitations issue, its resolution being unnecessary to that Court's disposition of this case on that Court's clearly stated ground that the Complaint "fail[ed] to state a cause of action for violation of [42 U.S.C. §1983]."

This Court should not exercise its discretionary jurisdiction to consider issues, the resolution of which is unnecessary to the disposition of a matter. Fundamental principles of judicial economy require that federal and constitutional issues, novel or otherwise, be decided only when they are determinative of the cause; where other grounds exist for disposition of a cause, the cause should be decided on such other grounds. This principle is particularly applicable to this Court's discretionary review of matters, by writ of certiorari, especially where the Court of Appeals, whose judgment Petitioner seeks to have reviewed, has, because of application of the same principle of judicial economy, not decided the federal or constitutional issue.

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* Moreover, the "conflict" to which Petitioner refers ignores the mandate of 42 U.S.C. §1988, which fosters diversity in its reference of the limitation period to state law. *See* discussion Point III, *infra*.

As this Court noted in *Sanks* v. *Georgia*, 401 U.S. 144, 151 (1971):

> [I]t has always been a matter of fundamental principle with this Court, a principle dictated by our very constitutional nature and constitutional obligations, that we exercise our powers of judicial review only as a matter of necessity.

See also United States v. *Petrillo*, 332 U.S. 1, 5 (1947):

> We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity.

Dismissal of Petitioner's complaint for failure to state a cause of action under 42 U.S.C. §1983 mooted the limitations issue before the Court of Appeals for the Third Circuit. Only if such dismissal were to warrant the grant of certiorari and only if such grant were to result in a reversal of such dismissal—neither result being justified by the record*—should the limitations issue be addressed, and then by the Court of Appeals for the Third Circuit in the first instance.

II. The dismissal of Petitioner's complaint for failure to state a cause of action under 42 U.S.C. §1983 was entirely appropriate under well-established precedent in this Court and in the courts of appeal and, in any case, does not present the "special and important reasons" required by Supreme Court Rule 17.

A. The uncontroverted facts do not support Petitioner's claim of a "systematic deprivation of New Jersey statutory relocation benefits." **

Petitioner was clearly afforded timely notice of available benefits. On May 9, 1973, more than fifteen (15) months in advance of Petitioner's actual dislocation and at least six (6) months prior to the first condemnation hearing, Petitioner was provided with the information booklet entitled

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* *See* discussion Point II, *infra*.

** (Petition, at 2).

"If I Must Move . . ." (R. 559a to 567a). Under the heading "What Notices Will I Get?", the information booklet informs recipients that notices will include formal public notices, personal contacts from relocation representatives as well as the booklet itself (R. 560a). Petitioner admits having received the information booklet "in May or June 1973" (R. 312a). In addition to enclosing the information booklet, the letter, dated May 9, 1973, also explained the location and office hours of the relocation office and described that relocation assistance services would be made available to Petitioner as it "may desire" (R. 459a).

In addition to having received the May 9th letter and having met with Racanelli in May 1973 (R. 612a), Petitioner participated in the condemnation proceedings in which Petitioner not only responded by pleadings to the Declaration of Taking, which in itself could not be more clearly notice of Respondent Authority's intent to relocate Petitioner, but also received notice to vacate the Premises by the November 12, 1972 Consent Order, set forth *supra*, by which Petitioner agreed to vacate as of February 1, 1973. Clearly, Petitioner was afforded more than "reasonably adequate notice," and the District Court below so held (R. 950a).

Petitioner further suggests that the WRAP approved and implemented on behalf of Respondent Authority was not "consistent with statutory mandates" (Petition, at 2).* It is clear, however, that the WRAP had been substantively approved by the Commissioner of DCA, as being in compliance with the requirements of the Relocation Assistance Law of 1971 (R. 455a)** and was implemented as ap-

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* As discussed *supra*, Petitioner does not question the validity and constitutionality of the statutory scheme (Petition, at 3).

** In his July 20, 1973 letter, the Commissioner stated:

> I have reviewed the Workable Relocation Assistance Program you have submitted and find the manner in which you propose to relocate persons displaced and the resources available for their relocation comply with the requirements of the *Relocation Assistance Law of 1971* and the *Regulations* promulgated thereunder (R. 455a).

proved. As the New Jersey Statute in question, N.J. Stat. Ann. §20:4-7 (West 1982), requires, the WRAP included "such measures, facilities or services" as may be necessary or appropriate to determine the needs of displaced businesses, to assist in relocating and to supply information concerning assistance. There is no question but that the WRAP formulated for the Meadowlands Complex was such a relocation assistance advisory program and was designed to facilitate the dissemination of information concerning relocation policies, benefits and procedures.

As the record, especially Racanelli's log sheets, demonstrate, relocation assistance was offered to Petitioner. That Petitioner chose to disregard the offers of assistance and chose not to take advantage of them is not Respondent Authority's failure. Petitioner's attempt to argue a violation of 42 U.S.C. §1983 out of its *own* failure is specious and clearly warrants the action of the Court of Appeals for the Third Circuit in dismissing Petitioner's complaint for failure to state a cause of action under 42 U.S.C. §1983.*

Analogously, the Federal District Court in *Boston* v. *United States,* 424 F.Supp. 259 (E.D. Mo. 1976), construing the federal relocation laws in a situation where

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* Each of the items in Petitioner's catalogue of assistance benefits allegedly not made available to Petitioner, were in fact provided to Petitioner through the relocation assistance representative or would have been made available to Petitioner had Petitioner cooperated with the relocation representative. Moreover, Petitioner was represented by counsel from the earliest meetings in 1974 throughout the relocation process, and all of the statutes and the regulations were matters of public record. Contrary to Petitioner's argument, Respondent Authority did not have the burden at the condemnation proceeding, or otherwise, to affirmatively establish statutory compliance. *Landon* v. *Plasencia,* —— U.S. ——, 103 S.Ct. 321, 74 L.Ed. 2d 21 (1982), offered by Petitioner as authority for such a duty on the part of Respondent Authority, is wholly inapplicable. *Plasencia* addresses the due process rights of resident aliens and neither the facts nor the law involved therein has any relevance to the matter sub judice.

the plaintiff had not availed itself of relocation assistance benefits, held that relocatees cannot claim failure on the part of the agency to provide advisory services where services were made available which the relocatee chose not to pursue. The Court stated:

> Plaintiffs [displacees] were provided with the necessary information with which to claim these rights but, apparently, chose not to contact the State Inter-Agency Council for Outdoor Recreation for advisory services. This Court will not require defendants to seek out persons who may be entitled to benefits under the law and provide those benefits to such persons. It is the Court's opinion that defendants satisfied the statute's requirements by providing the necessary information and allowing plaintiffs to decide whether to avail themselves of their statutory benefits. There is no evidence herein that plaintiffs were denied advisory services. To the contrary, the evidence indicates that plaintiffs were advised that such services were available but instead chose not to seek such services. Under these circumstances, plaintiffs are not entitled to injunctive relief.

Id. at 267.

Petitioner has also asserted a right as a matter of law to advance payment of relocation assistance.* The statute, however, provides that a person must make application for such advance payments, which would be available in any event only in hardship cases. N.J. Stat. Ann. §20:4-10(a)(2) (West 1982). No such application was made by Petitioner.**

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* It should be noted also that there is no constitutional right to relocation assistance. *United States* v. *Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261 (1950).

** Petitioner's equal protcetion argument also fails because, *inter alia*, it is premised upon a denial of statutory rights and benefits to Petitioner and to a class of which Petitioner is a member, when, in fact, no rights or benefits were denied to Petitioner or to such class.

B. Assuming *arguendo* that DCA Forms 101 and 102 were not certified and filed, such would constitute, at best, a *de minimis* failure to follow an administrative procedure prescribed by state law and would not confer substantive rights of constitutional dimension.

42 U.S.C. §1983, enacted as part of the Civil Rights Act of 1871, provides as follows:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any Citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity or other proper proceeding for redress.

A cause of action under 42 U.S.C. §1983 requires two primary allegations: (1) that plaintiff has been deprived of a federal right, and (2) that the one who has so deprived plaintiff acted under color of state law. *Gomez* v. *Toledo,* 446 U.S. 635 (1980). While Respondent Authority does not dispute that it acted under color of state law, Petitioner's allegations that he was deprived of federal rights reduce, as Judge Ackerman found upon analysis of the record, to the single claim of the failure of Respondent Authority to file the required DCA Forms 101 and 102. All other claims advanced by Petitioner as alleged violations of New Jersey Relocation and Eminent Domain Statutes were found to be without merit. The only alleged deficiency in the WRAP, the failure to certify, clearly does not rise to constitutional dimension, as Judge Ackerman found, and as the Court of Appeals for the Third Circuit found.

It is well-settled in this Court that not all violations of state law rise to the level of constitutional error. *Bishop* v. *Wood,* 426 U.S. 341, 349 n.13 (1976); *Paul* v. *Davis,* 424 U.S. 693 (1976); *Elkins* v. *United States,* 364 U.S. 206, 223-224 (1960); *Screws* v. *United States,* 325 U.S. 91 (1945). In *Paul* v. *Davis,* this Court, in noting that Congress' power to make criminal the conduct of

state officials under the aegis of the Fourteenth Amendment was not unlimited and that 42 U.S.C. §1983 was not applicable to mere violations of state law, rejected the view that the Fourteenth Amendment's due process clause should extend a right to be free of injury wherever the state may be characterized as the tortfeasor:

> We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law. *Griffin* v. *Breckenridge*, 403 U.S. 88, 101-102, 29 L.Ed. 2d 338, 91 S.Ct. 1790 (1971); *a fortiori* the procedural guarantees of the Due Process Clause cannot be the source for such law.

Id. at 701.

Similarly, various courts of appeal have held that not all state law violations have constitutional significance. *See,* for example, *United States* v. *Jiles,* 658 F.2d 194 (3rd Cir. 1981); *United States* v. *Scolnick,* 392 F.2d 320, 323 (3rd Cir. 1968), *cert. denied sub nom. Brooks* v. *United States,* 392 U.S. 931 (1968). As stated by the Court in *Jiles*:

> In determining whether the violation of a particular state law deprived a defendant of his due process rights under the fifth amendment, we must ascertain whether the state law directly conferred a substantive right on the defendant or merely created an *adminstrative plan to help the state regulate it officers' conduct. Slotnick* v. *Staviskey,* 560 F.2d 31, 34 (1st Cir. 1977), *cert. denied,* 434 U.S. 1077, 98 S.Ct. 1286, 55 L.Ed. 2d 783 (1978) ("The simple fact that state law prescribes certain proceedures does not mean that the procedures thereby require (sic) a federal constitutional dimension"). *See also Screws* [v. *United States*], 325 U.S. at 108, 65 S. Ct. at 1038; *States* v. *Jiles,* 658 F.2d 194, 200; *Street* v. *Surdyka,* 492 F.2d 368, (4th Cir. 1974). (Emphasis added).

United States v. *Jiles,* 658 F.2d 194, 200.

Thus, contrary to Petitioner's argument, the breadth of authority in this area demonstrates that *Jiles* is consistent with well-established precedent and should not be limited to

its facts. *See also King* v. *Hilton,* 525 F.Supp. 1192 (D.N.J. 1981):

> While *Jiles* involved the failure by state officials to follow state procedures in the context of a criminal proceeding, and thereby implicates the somewhat specialized jurisprudence of the exclusionary rule, the principles on which the *Jiles* decision rests are equally applicable to civil actions brought pursuant to 42 U.S.C. §1983.

Id. at 1198.

While Petitioner may have had the right to have a WRAP formulated and implemented, this was, in fact, done. Petitioner's rights do not extend to an interest in the execution of every administrative detail, especially one such as this which has no substantive significance under the circumstances of this case. It is clear that the representations* to which the Chief Executive Officer would have certified had the DCA Forms been filed were in fact carried out: the WRAP substantively met the approval of the Commissioner of Community Affairs and the WRAP was fully implemented. The irregularity of which Petitioner complained caused no damage to Petitioner. Petitioner's argument would, in effect, expand the jurisdiction of §1983 actions to every alleged technical violation of state law.

III. The additional legal issues set forth by Petitioner, not addressed by the Court below, do not present special and important reasons for review.

Petitioner also urges this Court to grant certiorari to consider the scope of *Parratt* v. *Taylor,* 451 U.S. 527 (1981) and the applicablity of appropriate limitations laws in civil rights cases. Since neither of these issues was necessary to the decision of the Court of Appeals for the Third Circuit in dismissing Petitioner's complaint and since neither

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* The Certifications DCA 101 and 102 basically affirm that the Relocation Plan submitted conforms with the statute and that the Authority will perform the Plan.

was therefore decided by such Court, this is not the appropriate case in which this Court should address these issues. Disposition of these issues, as the following discussion demonstrates, merely provides additional bases for the result reached below, further militating against the grant of certiorari.

A. Petitioner misperceives the prerequisites to a claim under 42 U.S.C. §1983 for violation of the due process clause.

In *Parratt* v. *Taylor*, 451 U.S. 527 (1981), this Court addressed the requirements for alleging a §1983 cause of action based purely on the due process clause of the Fourteenth Amendment. In *Parratt*, a prison inmate filed a claim under 42 U.S.C. §1983 against prison offcials alleging violation of his rights guaranteed by the Fourteenth Amendment as the result of the deprivation of his property without due process of law. Hobby materials which the prison inmate had ordered from outside the prison were delivered to and received by the prison, but were not delivered to the inmate and could not be located. The Court stated:

> Unquestionably, respondent's claim satisfies three prerequisites of a valid due process claim: the petitioner acted under color of state law; the hobby kit falls within the definition of property; and the alleged loss, even though negligently caused, amounted to deprivation. Standing alone, however, these three elements do not establish a violation of the Fourteenth Amendement. Nothing in the Amendment protects against all deprivations of life, liberty, or property by the State. The Fourteenth Amendment protects only against deprivations "without due process of law." Baker v. McCollan, 443 U.S., at 145, 61 L.Ed. 2d 433, 99 S.Ct. 2689. Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law.

Id. at 536-537.

In *Parratt*, the Supreme Court held that the prison inmate therein had not alleged a violation of the Due Pro-

cess Clause of the Fourteenth Amendment since, *inter alia,* the State of Nebraska had provided a remedy to persons who believe they have suffered a tortious loss at the hands of the state which the inmate had chosen not to pursue.

> [T]he existence of an adequate remedy to redress property damages inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.

Id. at 542. Were the cause not first dismissed upon the threshold issues discussed in Point II, *supra, Parratt* would be dispositive of this case, where remedies clearly existed for Petitioner's benefit which Petitioner elected not to use.

In *Paterson Redevelopment Agency* v. *Schulman,* 396 A. 2d 573 (1979), the New Jersey Supreme Court held that both N.J. Stat. Ann. §20:4-10(a) (3) (West 1982) and N.J. Stat. Ann. §20:4-19 (West 1982)* provided administrative remedies with regard to the amount of relocation payments or eligibility for payments under the Relocation Assistance Act. Additionally, as the Court noted, after a final decision by an administrative agency, the aggrieved displacee can appeal, as of right, to the state Appellate Division. *Id.* at 386. In language presaging *Parratt,* the New Jersey Supreme Court explained that requiring a displacee to present his claims to the agency furthers, *inter alia,* the salutary goal of avoiding unnecessary adjudication, particularly where constitutional issues may be implicated. *Id.* at 387. As the New Jersey Supreme Court decision in *Schulman* makes clear, the relief available under N.J. Stat. Ann. §20:4-19 (West 1982) is sufficient to compensate a relocatee for damages suffered. *Id.* at 390-393.

Petitioner would also have had recourse to two separate state statutes and state forums had it been unlawfully evicted as alleged. First, Respondent Authority gained pos-

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* Under the 1967 statute remedies were also provided. See N.J. Stat. Ann. §52:31B-8.

session of Petitioner's Premises pursuant to the November 20, 1973 Consent Order obtained in accordance with the provisions of the New Jersey Eminent Domain Act, N.J. Stat. Ann. §20:3.1 (West 1982). At any point throughout the eighteen (18) months of judicial action leading up to the final order directing Petitioner to vacate the Premises, Petitioner could have asserted, either as defense or counterclaim, that the action should be barred or delayed because of respondents' failure to comply with the strictures of the relocation laws or rules. Significantly, at no time did Petitioner choose to contest the process on the basis of purported wrongdoings by respondents. Second, subsequent to the Respondent Authority's having obtained possession of Petitioner's property, Petitioner could have sought relief under the New Jersey Tort Claims Act, N.J. Stat. Ann. §59:2-2(a) (West 1982); N.J. Stat. Ann. §59:3-1(a) (West 1982). Again, Petitioner chose not to avail itself of this avenue of redress provided by state law. Instead, Petitioner chose to wait more than six (6) years to bring this meritless §1983 suit. This is precisely the course of conduct which offended this Court in *Parratt.*

B. Petitioner misconstrues the statutory criteria applicable to the choice of limitations law in civil rights actions.

Congress did not establish a statute of limitations applicable to actions brought in federal court under §1983. *Board of Regents* v. *Tomanio,* 446 U.S. 478 (1980). Rather, a federal court must apply the state limitations law governing an analogous cause of action. *See* 42 U.S.C. §1988, which provides in relevant part as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the ***common law, as modified and changed by the consti-***

> *tution and statutes of the State wherein the court having jurisdiction of such civil or criminal causes is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause.* (Emphasis added.)

As indicated by the express terms of this statute, there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Johnson* v. *Railway Express Agency,* 421 U.S. 454, 464 (1975). A state limitation law is "more than a technical obstacle to be circumvented if possible." *Board of Regents,* 446 U.S. at 484.

It is unnecessary to speculate as to what statute of limitation the New Jersey courts would apply if Petitioner's action against Respondent Authority were brought in a New Jersey court. A New Jersey court has, in fact, addressed this issue and has determined that the two-year limitation contained in the New Jersey Tort Claims Act, N.J. Stat. Ann. §59:1-1 to 14-4 (West 1982), should apply to constitutional civil rights claims. *Lloyd* v. *Stone Harbor,* 432 A.2d 572 (Ch. Div. 1981).

The fact that the New Jersey Tort Claims Act has been held applicable to "constitutional" injuries is not, however, essential to the conclusion that the limitation period contained in the New Jersey Tort Claims Act is the limitation period to be applied in this case. Rather, analysis of Petitioner's claim in the context of the criteria prescribed for determining the appropriate state limitation law to be applied in civil rights cases, an analysis undertaken by the District Court (Petition, at 16a to 25a), convincingly demonstrates that the most analogous New Jersey state limitation law is that contained in the New Jersey Tort Claims Act and not the alternative limitation law suggested by Petitioner, N.J. Stat. Ann. §2A:14-1 (West 1982) (the general New Jersey six-year statute of limitations for injury to property), which clearly does not apply to "constitutional" injuries.

Petitioner's argument that application of the New Jersey Tort Claims Act limitation disregards the nature of the underlying cause of action (Petition, at 9-10) is groundless. As described by the District Court, Petitioner's claim against Respondent Authority is "a claim for tortious injury to property at the hands of a public authority" (R. 798a). This is precisely the type of claim covered by the New Jersey Tort Claims Act, a statute which, contrary to Petitioner's suggestion, does not apply to all claims against a public entity regardless of their nature. Had Petitioner's claim, for example, involved a contract claim against a public entity, the New Jersey Contractual Liability Act, N.J. Stat. Ann. §59:13-1 to 13-10 (West 1982), and its limitation law, N.J. Stat. Ann. §59:13-5 (West 1982), would have been applicable by analogy.

Contrary to Petitioner's argument (Petition, at 8-11), application of the limitation period contained in the New Jersey Tort Claims Act to Petitioner's claims against Respondent Authority is not inconsistent with federal law. It should be noted at the outset that outcome determination has no bearing on the issue of "inconsistency":

> A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the §1983 action were the only benchmark, there would be no reason at all to look to state law, for the approprate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But §1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.

Robertson v. *Wegmann*, 436 U.S. 584, 593 (1978).

Reduced to its essential, Petitioner's "inconsistency" argument is that the New Jersey Tort Claims Act, which Petitioner claims "preserves" sovereign immunity, is inconsistent with certain decisions of this Court, particularly *Owen* v. *City of Independence*, 445 U.S. 622 (1980), which Petitioner claims "abolish" sovereign immunity. This argument is not only overly simplistic; it is also misleading factually.

While in *Owen* this Court held that municipal bodies sued under §1983 were not entitled to a qualified privilege, sovereign immunity was not "abolished" generally. Quite to the contrary, this Court simply held that sovereign immunity could not limit a municipality's liability under §1983. *Id.* at 644. This is totally consistent with New Jersey Court decisions interpreting the New Jersey Tort Claims Act, while, like Owen, while recognizing the preservation of some degree of sovereign immunity as to tort claims arising out of discretionary acts or omissions, hold that such immunity does not limit a §1983 action.

The two doctrines that traditionally afforded municipal corporations protection from tort liability under the doctrine of "sovereign immunity" are discussed at length in *Owen.* The first doctrine, which distinguishes between a municipality's "governmental" and "proprietary" functions, has, as noted by the Court in *Owen,* essentially eroded. *Id.* at 644-47. The New Jersey Tort Claims Act, enacted after substantial judicial criticism of this doctrine, *see,* for example *B.W. King, Inc.* v. *West New York,* 230 A.2d 133, 141 (1967), reflects this general trend. *See Tower Marine, Inc.* v. *New Brunswick,* 420 A.2d 1029, 1038 (Ch. Div. 1980). The second doctrine, which distinguishes between "discretionary" activities and "ministerial" activities, is not disturbed by the Court in *Owen* because it simply has no applicability to §1983 actions:

> That common-law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a §1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitutional Statutes.

Owen, 445 U.S. at 649. The New Jersey decisions interpreting and applying the New Jersey Tort Claims Act are

totally consistent with this view. *See*, for example, *T & M Homes, Inc.* v. *Township of Mansfield*, 393 A.2d 613, 622 (Law Div. 1978) (wherein the Court held that the New Jersey Tort Claims Act, which excuses municipalities and their officials from liability with respect to discretionary acts, did not bar a suit against the municipality and officers of the municipality charging a violation of federal rights). *See also Mancini* v. *Lester*, 630 F.2d 990, 994-95 (3d Cir. 1980) (citing *T & M Homes*); *Gipson* v. *Bass River*, 82 F.R.D. 122 (D.N.J. 1979).

Thus, contrary to Petitioner's argument, application of the limitation period contained in the New Jersey Tort Claims Act does not constitute borrowing of "sovereign immunity" (Petition, at 10). The New Jersey Tort Claims Act basically abolishes sovereign immunity; the fact that the Act contains a limitation period (a reasonable one of two years for suit against governmental bodies) does not alter this fact. As the recommendations of the *Report of the Attorney General's Task Force on Sovereign Immunity* (May, 1972), specifically followed in the enactment of the New Jersey Tort Claims Act, state, "[i]t is time for the reasonable abolition of sovereign immunity in the State of New Jersey," (Appendix, at 9) and "an examination of the rather haphazard approach to government liability extant in the State of New Jersey today provides convincing evidence that only a *comprehensive* and *uniform* statute which applies to all governmental entities—whether local or state—including public authorities, will provide for the development of an intelligent and uniform body of governmental tort law in the State of New Jersey." (Appendix, at 15).

Finally, Petitioner's argument that there is a conflict among the Circuits on the limitation law to be applied in civil rights cases is misleading. As noted *supra*, the decision of the Court of Appeals for the Third Circuit is not in conflict with the decision of any other Court of Appeals on this issue, the Third Circuit not having decided this issue. Moreover, Petitioner ignores the fact that any di-

versity which may exist in the decisions of other Circuit Court of Appeals results largely from the mandate of 42 U.S.C. §1988, which requires a federal court to analyze the unique set of limitation statutes (and tort claims statute) which exist in any particular state to determine the limitation period which would be applied by a state court in an analogous action. Resolution of this question is necessarily idiosyncratic.

Thus, for example, the Ninth Circuit decisions referred to by Petitioner are distinguishable. In applying the analogous California limitations law, the Court of Appeals for the Ninth Circuit has applied the California statute of limitations applicable to all *statutory* causes of action that do not contain their own limitation period, a limitation law consistently applied by the Ninth Circuit before enactment of the California Tort Claims Act. *See Donovan* v. *Reinbold*, 433 F.2d 738 (9th Cir. 1970). New Jersey has no such statute. Moreover, in considering the application of the California Tort Claims Act limitation period, the Ninth Circuit has not distinguished application of such period from application of all of the provisions of the California Tort Claims Act (*e.g.*, claim provisions, etc.), the latter having been argued by the defendants in *Donovan* and having been assumed by the Court. Such distinction should be made and has, in fact, been made by state and federal courts sitting in New Jersey.

CONCLUSION

For the reasons hereinabove set forth, Respondent New Jersey Sports and Exposition Authority respectfully requests that the Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

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Attorneys for Respondent, New Jersey Sports and Exposition Authority,

By: JOSEPH A. RIZZI.

Dated: May 12, 1983

APPENDIX

Limitation of Civil Actions

N.J. STAT. ANN. §2A:14-1. *6 years*

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

This section shall not apply to any action for breach of any contract for sale governed by section 12A:2-725 of the New Jersey Statutes.

New Jersey Relocation Assistance Act of 1971

N.J. STAT. ANN. §20:4-4. *Moving and related expenses*

a. If a taking agency acquires real property for public use, it shall make fair and reasonable relocation payments to displaced persons and businesses as required by this act, for:

(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(2) actual direct losses or tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the taking agency; and

(3) actual reasonable expenses in searching for a replacement business or farm.

b. Any displaced person eligible for payments under subsection a. of this section who is displaced from a dwelling and who elects to accept the payments authorized by this subsection in lieu of the payments authorized by subsection a. of this section may receive a moving expense allowance, determined according to a schedule established by the taking agency, not to exceed $300.00, and a dislocation allowance of $200.00.

c. Any displaced person eligible for payments under subsection a. of this section who is displaced from his place of business or from his farm operation and who elects to accept the payment authorized by this sub-

section in lieu of the payment authorized by subsection a. of this section, may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation, except that such payment shall not be less than $2,500.00 nor more than $10,000.00. In the case of a business, no payment shall be made under this subsection unless the taking agency is satisfied that the business (1) cannot be relocated without a substantial loss of its existing patronage, and (2) is not a part of a commercial enterprise having at least one other establishment not being acquired by the taking agency, which is engaged in the same or similar business. For purposes of this subsection, the term "average annual net earnings," means one-half (½) of any net earnings of the business or farm operation, before Federal, State and local income taxes, during the two (2) taxable years immediately preceding the taxable year in which such business or farm operation moves from the real property acquired for such project, or during such other period as such agency determines to be more equitable for establishing such earnings, and includes any compensation paid by the business or farm operation to the owner, his spouse or his dependents during such period.

N.J. STAT. ANN. §20:4-7. *Relocation assistance advisory programs*

a. Whenever the acquisition of real property for a program or project undertaken by a taking agency will result in the displacement of any person on or after the effective date of this section, such agency shall provide a relocation assistance advisory program for displaced

persons which shall offer the services prescribed herein. If the taking agency determines that any person occupying property immediately adjacent to the real property acquired is caused substantial economic injury because of the acquisition, it may offer such person relocation advisory services under such program.

b. Each relocation assistance program required by subsection a. shall include such measures, facilities, or services as may be necessary or appropriate in order (1) to determine the needs of displaced persons, business concerns, and nonprofit organizations for relocation assistance; (2) to assist owners of displaced business and farm operations in obtaining and becoming established in suitable business locations or replacement farms; (3) to supply information concerning programs of the Federal, State and local governments offering assistance to displaced persons and business concerns; (4) to assist in minimizing hardships to displaced persons in adjusting to relocation; and (5) to secure, to the greatest extent practicable, the coordination of relocation activities with other project activities and other planned or proposed governmental actions in the community or nearby areas which may affect the carrying out of the relocation program.

N.J. STAT. ANN. §20:4-10. *Authority of the commissioner*

a. The commissioner shall adopt such rules and regulations as may be necessary to assure:

(1) that the payments and assistance authorized by this act shall be administered in a manner which

is fair and reasonable, and as uniform as practicable;

(2) that a displaced person who makes proper application for a payment authorized for such person by this act shall be paid promptly after a move or, in hardship cases, be paid in advance; and

(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this act, or the amount of a payment, may have his application reviewed by the head of the taking agency or other appropriate officer.

b. The commissioner may prescribe such other regulations and procedures, consistent with the provisions of this act, as he deems necessary or appropriate to carry out this act.

N.J. STAT. ANN. §20:4-11. *Administration*

In order to prevent unnecessary expense and duplication of functions, and to promote uniform and effective administration of relocation assistance programs for displaced persons, the commissioner may authorize any taking agency to enter into contracts with any individual, firm, association or corporation for services in connection with such programs, or may carry out its functions under this act through any Federal or State agency or instrumentality having an established organization for conductinng relocation assistance programs.

New Jersey Relocation Assistance Act of 1971

N.J. STAT. ANN. §20:4-18. *Payments under this act additional to awards in condemnation awards*

The payments authorized in this act shall not be construed as creating in any condemnation proceeding brought under the power of eminent domain any element of damages not in existence on the effective date of this act and such payments are to be in addition to the just compensation established in the condemnation proceedings but only to the extent they are not otherwise included within the condemnation award.

N.J. STAT. ANN. §20:4-19. *Appeal procedure*

Any person or business concern aggrieved by final administrative determination, concerning eligibility for relocation payments authorized by this act may appeal such determination to the Superior Court.

New Jersey Relocation Assistance Act of 1967

N.J. STAT. ANN. §52:31B-8. *Aggrieved persons; hearing*

Any person or business concern aggrieved by any final action, ruling, notice or order of any State agency or unit of local government in the discharge of any duty imposed by this act on any such State agency or unit of local government, shall be entitled to a hearing before the commissioner. The application for such hearing must be filed with the commissioner within fifteen (15) days of the receipt by the applicant therefor of notice of the action, ruling, notice or order complained of. No such hearing shall be held except upon seven (7) days' written notice to all interested parties, and each such hearing shall be held within fifteen (15) days of the receipt of the application therefor. Within ten (10) days after the completion of such hearing, the commissioner shall issue an appropriate order approving, modifying, and approving as so modified, or setting aside in whole or in part the action, ruling, notice or order complained of, a copy of which order shall be served on all interested parties. Pending the determination by the commissioner, and upon application therefor, the commissioner may grant a stay of the action, ruling, notice or order complained of; provided, that no such stay shall be granted except upon such terms and conditions as will insure compliance with the provisions of this act.

New Jersey Tort Claims Act

N.J. STAT. ANN. §59:2-2. *Liability of public entity.*

a. A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.

b. A public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable.

N.J. STAT. ANN. §59:3-1. *Generally*

a. Except as otherwise provided by this act, a public employee is liable for injury caused by his act or omission to the same extent as a private person.

b. The liability of a public employee established by this act is subject to any immunity of a public employee provided by law and is subject to any defenses that would be available to the public employee if he were a private person.

Excerpts from Report of the Attorney General's Task Force on Sovereign Immunity

GEORGE F. KUGLER, JR.
Attorney General
STATE OF NEW JERSEY

May, 1972

CHAPTER 2

ATTORNEY GENERAL'S RECOMMENDATIONS

SUMMARY

While there are many significant proposals contained throughout this report and particularly in the draft legislation, it is the central thesis of this report that the liability of the State of New Jersey in contract and tort be adjudicated through the regular court system without a jury trial and pursuant to a comprehensive statutory scheme.

Specifically the principal recommendations are as follows:

1. ***The State of New Jersey should legislatively provide selective abolition of its sovereign immunity in contract and tort.***

It is time for the reasonable abolition of sovereign immunity in the State of New Jersey. Throughout other jurisdictions there has been an increasing and steady movement away from immunity. The growing recognition that the basic unfairness of the State's refusal to permit itself to be sued when its actions result in injury to innocent third parties has become an impelling force

for change. An examination of governmental immunity in the State of New Jersey establishes the principle that while all the local units of government must face the test of liability in the courts, the State of New Jersey will not do so. Even on the State level the Legislature has embarked upon a "case by case" method of abolishing immunity by the usage of the phrase "may sue and be sued." Thus, some State agencies are still immune from suit while others have either the fortune or misfortune of having been granted the ability to sue and be sued and therefore are liable for tortious conduct to the same extent as any local governmental entity.

At a time when the responsiveness of all levels of government is being continuously challenged, it is difficult to continue to support such an arbitrary and unjust doctrine. It seems even more difficult to believe that the State of New Jersey is willing to provide a crime compensation fund for payments to victims of crime—a victimization over which the State has little effective control—and at the same time continue to refuse to permit itself to be sued when its own conduct and that of its employees has harmed equally innocent third persons. In this regard it should be noted that two other states who have passed crime compensation legislation—New York and California—did so after they had long since abandoned the archaic doctrine of sovereign immunity.

Examination of those two jurisdictions in particular has confirmed the belief that the State need not fear unlimited and uncontrolled liability from a selective and intelligent waiver of its immunity from suit. It is, therefore, strongly recommended that the State abolish its traditional shield of sovereign immunity.

Excerpts from Report of the Attorney General's Task Force on Sovereign Immunity

2. *The present legislative procedure for adjudicating all claims against the State should be abolished.*

The New Jersey Legislature is currently confronted with the same inappropriate and burdensome task of deciding individual claims against the State which ultimately resulted in the Congress of the United States passing the Federal Tort Claims Act in 1946. In addition to considerations of fair play and justice for the innocent victims of tortious conduct, the Congress found itself compelled to waive immunity to relieve itself from passing upon a myriad of private bills, from acting as a fact-finding agency as well as a judicial forum, and from the burden of attempting to expedite payment of meritorious claims.

Governor Cahill and former Governor Hughes have both articulately expressed the manifest injustice and obvious inequities inherent in the current legislative claims procedure. It is clearly time for the Legislature of the State of New Jersey to relieve itself from the burdens imposed by the adjudication of claims presented to it, and it is clearly time for the Legislature to admit that it is not and was never intended to be constituted or equipped to perform what is essentially a judicial role—fact-finding and ruling on the merits of a claim. Other legislatures have abandoned this task without great difficulty. In New York, for example, a constitutional amendment in 1874 proscribed the legislature from auditing or allowing any private claim or account against the State. This amendment was prompted by criticisms similar to those already leveled at the procedure in New Jersey today, namely: (1) the legislature should not act as a judicial body; (2) claims were actually decided in committee and

the entire body of the legislature never knew what they were voting for; (3) the legislature did not have adequate time to make proper investigations of claims; (4) a separate agency would give greater uniformity of decisions. In fact, in light of the other staggering burdens imposed upon legislative members, it would seem that functions peculiarly unsuited for their deliberations should no longer occupy their valuable time.

While it is urged that the Legislature should remove itself from the normal processing procedure, it is nonetheless believed that it should retain sufficient authority to rule upon claims which may fall within a category commonly referred to as "moral obligations." Such obligations usually arise in situations where the law does not provide for a remedy, but where the hardship involved cries out for relief. The legislatures of the States of New York and California have used this approach effectively and fairly, and it is suggested that the New Jersey Legislature should also retain this very limited claims review function.

3. *The State of New Jersey should immediately enact a contract liability statute.*

The overwhelming majority of States throughout the country as well as the Federal Government have been and are subjecting themselves to liability for contract claims. In fact, the officials interviewed in some jurisdictions were amazed to find that a State could voluntarily enter into a contract and then be free to completely disclaim its obligations under the very contract it had agreed to. Indeed it is even arguable that such immunity may in fact be an unconstitutional impairment by a State of the obligations of contract. It seems clear

that it is unconscionable for a State to be permitted to repudiate a contract which it has voluntarily entered and which binds the other parties. In any event, it is strongly urged that the State of New Jersey should be liable for contract claims against it.

While this proposal is primarily intended to treat the State similarly with private individuals in matters arising out of contract, it is nonetheless recommended that the State should not be subjected to liability on the basis of a contract implied at law, for a breach of implied warranty or for consequential damages since the nature and extent of such liability in damages would expose the State to unforeseen risks.

4. *New Jersey should enact a comprehensive tort claims statute containing specific immunities which applies to all public entities throughout the State.*

It is recommended that the Legislature enact a uniform and comprehensive tort claims act providing the statutory framework for adjudicating the liability of *all public entities* throughout the State of New Jersey. This recommendation follows the basic statutory approach contained in the California Tort Claims Act of 1963. The proposed Act would *reestablish the immunity* of all public entities in the State of New Jersey *subject to liabilities* set out in reasonable detail in the statute. In addition, certain specific immunities are provided for the exercise of governmental functions. The California Law Revision Commission's recommendations contain the following comment in support of the above proposal:

> "A statute imposing liability with specified exceptions will provide the governing bodies of public

entities with little basis upon which to budget for the payment of claims in judgments for damages, for public unforeseen situations, any one of which could give rise to costly litigation in any possible damages judgment. Such a statute would invite actions brought in hopes of imposing liability on theories not yet tested in the Court and could result in greatly expanding the amount of litigation and the attendant expense which public entities would face. Moreover, the cost of insurance under such a statute would no doubt be greater than under a statute which provided for immunity except to the extent provided by enactment, since an insurance company would demand a premium designed to protect against the indefinite area of liability that exists under a statute imposing liability with specified exceptions.

"Accordingly, the legislation recommended by the Commission provides that public entities are immune from liability unless they are declared to be liable by an enactment. This will provide a better basis upon which the financial burden of liability may be calculated, since each enactment imposing liability can be evaluated in terms of the potential cost of such liability. Should further study in future years demonstrate that additional liability of public entities is justified, such liability may be imposed by the Legislature but in carefully drafted limits."

See *California Law Revision Commission, Recommendations Relating to Sovereign Immunity,* 811 (1963).

Excerpts from Report of the Attorney General's Task Force on Sovereign Immunity

Moreover, an examination of the rather haphazard approach to government liability extant in the State of New Jersey today provides convincing evidence that only a *comprehensive* and *uniform* statute which applies to all governmental entities—whether local or State—including public authorities, will provide for the development of an intelligent and uniform body of governmental tort law in the State of New Jersey.

In an effort to assist in the development of such a body of tort law, the following specific substantive provisions are included in the proposed New Jersey Tort Claims Act:

A. A broad provision immunizing a public entity for highlevel discretionary activities based upon the underlying thesis that "it is not a tort for government to govern" and allowing a very limited review of the allocation by government of resources already obtained.

B. Immunity for issuance, denial, suspension or revocation of permit, license, etc.

C. Immunity for failure to inspect, or negligent inspection of, property.

D. The discretionary decision to enforce or not to enforce the laws.

E. Generally no liability for the failure to provide adequate supervision of public recreational facilities.

F. No liability for the actual fraud, actual malice or willful misconduct of public employees.

G. A broad immunity for injuries resulting from a plan or design of public property when it has been of-

ficially approved by an authorized governmental body.

H. A broad immunity for injuries occurring on unimproved property and generally when government lands are provided in their natural state for recreation and enjoyment (on the thesis that in light of the limited funds available for the acquisition and improvement of such property, it is reasonable to expect persons using that property to assume the risk of injuries arising thereform as part of the price to be paid for the benefits received).

I. Prisoners may sue under the Act for injuries resulting from the negligence of public entities or their employees but not during their period of institutional confinement. Also there is no recovery against public employees or a public entity for injuries to prisoners caused by other prisoners.

J. Generally, immunity for the failure to provide or the inadequate provision of personnel, facilities or equipment in most areas of governmental responsibility—such as police, fire, hospital care, etc.

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NO. 82-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BLAZER CORPORATION,

Petitioner,

v.

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. McCRANE and "JOHN DOES," said names being fictitious,

Respondents.

BRIEF OF INDIVIDUAL RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Question Presented

Whether the Court of Appeals for the Third Circuit erred in affirming the dismissal of the complaint for failure to state a cause of action under the Civil Rights Act of 1871, 42 U.S.C. § 1983?

The Parties

Petitioner Blazer Corporation is a corporation of the State of New Jersey currently located and operating at 700 21st Avenue, Paterson, New Jersey. Prior to August 15, 1974 Blazer was a tenant leasing the land and premises located at 400 Paterson Plank Road, East Rutherford, New Jersey, where Blazer was engaged in the manufacture of air conditioning systems. The owner of the land and buildings which Blazer leased, and which form the basis for this law suit, is not a party to this suit.[1]

The respondent New Jersey Sports and Exposition Authority (hereinafter, the "Authority") is a body politic and corporate of the State of New Jersey established in the Department of Community Affairs having its principal office at the "Sports Complex" in East Rutherford, New Jersey. The Authority was created by State legislation enacted in May of 1971. N.J.S.A. 5:10-1, *et seq.* L. 1971, c. 137. Respondents Werblin, Serraino, Foley, Kugler, Lewis and McCrane, who are named in their individual capacity, were members of the Authority.

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[1] While the owner of the land and building, Blazer Realty Corporation, is technically not a party to this suit, brought by Blazer Corporation, the two corporations are wholly owned and controlled by the same persons and are, for all intents and purposes, one company. Until his recent death, Benjamin Blazer owned both corporations. References in this brief to "Blazer" shall mean only Blazer Corp., not the Realty Corp., except where otherwise indicated in the text.

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NO. 82-1614

IN THE

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OCTOBER TERM, 1982

BLAZER CORPORATION,

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NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. McCRANE and "JOHN DOES," said names being fictitious,

Respondents.

BRIEF OF INDIVIDUAL RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions and Judgments Below

The opinion of the Court of Appeals for the Third Circuit, entered on December 2, 1982, is unreported and is reproduced in the appendix attached to petitioner's petition (Pa36 to Pa38).[2] The Order of the Court of Appeals for the Third Circuit denying petitioner's motion for a rehearing *en banc* was issued on Decemeber 29, 1982, is unreported, and is reproduced in the appendix to the petitioner's petition (Pa39 to Pa40). The opinion of the District Court for the District of New Jersey dismissing the suit against the respondent Authority was rendered on November 16, 1981, was made into an Order on December 7, 1981, is unreported, and that opinion is reproduced in the appendix to petitioner's petition (Pa16 to Pa25). The District Court for the District of New Jersey rendered an opinion dismissing the suit against respondents Werblin, Serraino, Foley, Kugler, Lewis and McCrane on March 1, 1982. That opinion was made into an Order on March 15, 1982, is unreported, and is reproduced in the appendix to petitioner's petition (Pa26 to Pa35).

Jurisdiction

The petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes and Regulations Involved

The petitioner alleges a violation of its rights under the Constitution of the United States and under the Civil Rights Act of 1871, 42 U.S.C. § 1983, based upon allegations that the respondents failed to comply with the provisions in the New Jersey Eminent Domain Act of 1971, N.J.S.A. 20:3-1 *et seq.*, the New Jersey Relocation Law of 1967, N.J.S.A. 52:31B-1 *et seq.*, and the New Jersey

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[2] "Pa" refers to the appendix attached to petitioner's petition.

Relocation Act of 1971, N.J.S.A. 20:4-1 *et seq.* Specifically, the petitioner alleges a violation of the Constitutional guarantees of due process and equal protection as contained in the Fourteenth Amendment, which provides, in pertinent part, as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, wthout due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The petitioner also alleges a violation of its rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983. That statute is set forth in this appendix to the petitioner's petition (Pa12). The state statutes involved are set forth in the appendix to petitioner's petition (Pa1 to Pa11).

Statement of the Case

In 1971 and 1972, pursuant to the directive contained in N.J.S.A. 5:10-6, the Authority commenced the planning of the construction of the Sports Complex. Entailed in this planning was a determination of the property needed for the Sports Complex. Blazer was located on land which the Authority concluded was necessary for the project. The Authority is authorized by statute to acquire land and other property by the power of emiment domain. N.J.S.A. 5:10-5(m). By letter dated June 12, 1972 the Authority informed the owner of the property, Blazer Realty Corp., that, pursuant to statute, the Authority's appraisers, Jackson-Cross Company, would be making an inspection of the property. In the summer of 1972 the representatives of Jackson-Cross has numerous contacts with Blazer Realty Corp. regarding inspection of the premises.

On February 28, 1973, also pursuant to statute, the Authority made a written offer to acquire the subject property. That offer was rejected and on May 20, 1973, in accordance with N.J.S.A. 20:3-1 *et seq.*, the Authority filed a Complaint in Condemnation and Declaration of Taking on the Blazer property. Simultaneously therewith, the Authority deposited $1,115,000.00 with the Clerk of the Superior Court of the State of New Jersey pursuant to an Order for Payment into Court. On August 22, 1973, pursuant to an Amendment to Declaration of Taking and Order for Payment into Court, the Authority deposited an additional $214,395.00 with the Clerk of the Superior Court of New Jersey, for a total of $1,329,395.00. On March 20, 1973 the Authority filed a Notice of Filing of Declaration of Taking, Notice of Making Deposit and Demand for Possession.

The Authority then filed a Notice of Motion returnable July 5, 1973, seeking an order requiring Blazer and the owner of the land and buildings to vacate the property and premises by November 1, 1973. Counsel for both Blazer corporations filed a motion, also returnable July 5, 1973, seeking to withdraw the monies deposited in the Superior Court Trust Fund. On November 12, 1973, after numerous conferences between counsel and court, the Superior Court of New Jersey, per Judge Theodore W. Trautwein, entered an Order for Withdrawal of all monies deposited (R569 to R574).[3] Significantly, this Order was consented to in writing by all parties, including Blazer's owner, Benjamin Blazer, and its then attorney, Arthur Greenbaum (R574). In paragraph 12 of this Order it states:

> "The defendant Blazer Corporation (tenant in possession) having specifically agreed to vacate all lands and premises which they presently occupy and which are the subject of these proceedings no later than February 1, 1974, said date shall not be extended

[3] "R569" refers to the page in the appendix submitted by petitioner to the Court of Appeals for the Third Circuit.

> without consent of the [Authority], and said [Blazer Corp.] shall vacate said lands and premises on or before said date in the absence of such consent."

By letter dated December 12, 1973 the Authority consented to allow Blazer to remain in possession of the subject premises until May 1, 1974 in accordance with the terms provided for in the Order for Withdrawal dated November 12, 1979 (R575). By letter dated April 23, 1974 the Authority granted an additional extension until June 1, 1974 (R567). Nevertheless, the Authority was required to move before the Superior Court of New Jersey on June 11, 1974 for an Order declaring Blazer to be in violation of the Order of November 12, 1973, as modified. On June 20, 1974 Judge Trautwein entered an Order declaring Blazer to be in violation of the Order of November 12, 1973, as modified (R577 to R579). Further, the June 20, 1974 Order required Blazer to vacate its rear building by June 24, 1974 and its front office building by July 1, 1974; in the event of noncompliance, the Sheriff of Bergen County was to take the necessary steps to guarantee possession to the Authority. Finally, the Order of June 20, 1974 established per diem fines if the Order of the Court was not followed.

Meanwhile, in April of 1973 the Authority entered into an agreement with the New Jeresy Department of Transportation (hereinafter "DOT") to formulate and implement a relocation assistance plan on behalf of the Authority (R447 to R452). In accordance with this agreement, DOT did develop and effectuate a relocation plan (R480 to R567). Also in accordance with the interagency agreement, DOT provided four experienced full time relocation officers and a secretary, with additional staff as needed (R582, ¶12). These relocation officers were located in an office on the Sports Complex site in East Rutherford (R582, ¶2).

The relocation officers assigned to this project immediately commenced personal contact with the displacees. The officer assigned to Blazer, John Racanelli, made initial contact with Blazer's owner, Benjamin Blazer, in May 1973

(R583, ¶4; R33, ¶4). As Racanelli recalls, he met with Benjamin Blazer in May 1973 for several hours and explained the relocation process and handed Mr. Blazer a Relocation Assistance Handbook (R33, ¶4; R583, ¶4; R559 to R567). Racanelli also met that month with Mr. Arthur Greenbaum, Blazer's attorney, and explained the procedures to him (R33, ¶4; R582, ¶4). In both his conversation with Benjamin Blazer and with Arthur Greenbaum, Racanelli offered his assistance and informed them that in order to help he would need access to the Blazer premises to assess the requirements of the move and of a new location (R33 to R34; R583 to R585).

The relocation officers were required to keep log sheets of all calls. Racanelli's call sheets reveal approximately 30 contacts, or efforts to contact, Benjamin Blazer and/or the attorney, Greenbaum (R588 to R605. Many other contacts were made, or attempted, with various plant managers or supervisors of Blazer. Racanelli's entries indicate that from May to August 1973 he explained the relocation process to Mr. Blazer and Mr. Greenbaum (R588). From August 1973 through June 1974 Racanelli made repeated efforts to obtain the information necessary in order to assist Blazer in finding a new site, but Racanelli was never allowed sufficient access to the Blazer plant so as to assess its physical needs for a new facility or to provide the requisite data to movers (R588 to R594).

Benjamin Blazer's reluctance to participate in the relocation process may be explained by the position he took in the state court proceedings before Judge Trautwein, where Mr. Blazer indicated his belief that the Sports Complex would not receive funding (R34, ¶6; R584, ¶5). However, by January 1974 it became clear that the Sports Complex would be fully financed. In February 1974 Benjamin Blazer advised Racanelli that Blazer was considering building a new facility elsewhere and since that would take at least six months, moving estimates were not yet necessary (R590). This notion was repeated to Racanelli by Mr. Blazer on March 22, 1974, despite Racanelli and Green-

baum having previously discussed the then existing court order directing Blazer to vacate the premises by May 1, 1974 (R590). By April 1974 Racanelli, frustrated by his inability to gain access to the Blazer premises, called the Authority's General Counsel to intercede in his effort (R592).

On May 22, 1974 Racanelli was finally able to meet with Blazer representatives and to discuss the type of machinery which would have to be moved (R592). On June 14, 1974 Blazer advised Racanelli that two relocation sites were under consideration but he refused to provide Racanelli with addresses (R594). On June 19, 1974 Racanelli and Blazer personnel went to a site selected by Blazer for relocation: 100 Orchard Street, Hackensack (R594). The Blazer personnel advised Racanelli that the only matter not completed was that Mr. Blazer had not yet signed the lease, which was sitting on his desk (R594; R596). Blazer personnel advised the Authority that the company needed some additional time. The Sports Complex engineers, by letter of June 21, 1974, informed the Authority that Blazer could remain in possession until August 15, 1974, but that Blazer's presence on the site after that date would cause serious delays and entail substantial additional construction expenses (R606 to R607). Thereafter, on July 16, 1974, Judge Trautwein entered an Amendment to the Order to Vacate Premises (R608 to R610). Paragraph 1 of the July 16, 1974 Order amended paragraph 2 of the Order of June 20, 1974 by requiring Blazer to vacate the premises on or before August 15, 1974. Paragraph 2 of the Order of July 16, 1974 stated:

> "The plaintiff [Authority] may enter into possession of the said land and premises on August 15, 1974 and commence demolition of the building and other improvements thereon without further Order of this Court."

On July 16, 1974 two moving estimates were given by Blazer personnel to Racanelli but were immediately re-

turned as lacking necessary information (R594). On July 26, 1974 Racanelli was told by Blazer representatives to pick up two moving estimates (R596). They repeated that the leases were still on Mr. Blazer's desk awaiting his signature. By August 1, 1974 three moving estimates were picked up by Racanelli and hand delivered to Trenton for review (R596). The next day the Blazer personnel again advised Racanelli that the lease was awaiting Mr. Blazer's signature (R596). This information was repeated to Racanelli several times during the next week (R596). On August 12, 1974 the amount of $208,210.00—the lowest estimate—was authorized for the move to 100 Orchard Street, Hackensack (R586a, ¶9). This authorization letter was hand delivered by Racanelli to Blazer, where Racanelli was again informed that Mr. Blazer—who, it turned out, was vacationing in Florida—had not yet signed the lease for the facility at that address (R596). Nonetheless, the Blazer personnel selected a mover and arranged for a move, to commence on August 14, 1974 (R598). Racanelli met with the movers on August 13, 1974 at the Blazer premises to discuss the move (R598). The loading of equipment and machinery onto trucks began on August 14, 1974. When the movers—and Blazer's employees—showed up at the Blazer premises on August 15, 1974 they were confronted with locked gates and a sign declaring that Blazer had filed for bankruptcy (R598).

On August 16, 1974 Blazer voluntarily filed a Petition for Reorganization under Chapter XI of the Bankruptcy Act. As part of that proceeding Blazer obtained an Order appointing a Receiver (R132 to R135). Part of said Order imposed restraints against the Authority in connection with the move. The Authority moved to dissolve the restraints, and on August 27, 1974 Consent Orders were entered in the Chapter XI proceeding and in the state court condemnation proceeding, both of which required the two Blazer corporations to vacate the subject premises by 5:00 p.m. on September 3, 1974. The Blazer corporations finally vacated the subject property on September 5, 1974. The machinery was moved to and stored in the mover's ware-

house, at an additional cost to the Authority of $108,000.00. At no time did the Sheriff evict Blazer from its premises. Blazer is now operating in Paterson, New Jersey. The condemnation suit in Superior Court of New Jersey, which was previously placed on the inactive list at the request of Blazer, was recently settled.[4]

On August 13, 1980, nearly six years to the day from the day the movers appeared at its gates, Blazer filed this suit under 42 U.S.C. § 1983. On September 17, 1981 Blazer moved for partial summary judgment against all respondents. On October 8, 1981 the individual respondents cross-moved for summary judgment, asserting, *inter alia,* that the complaint failed to show a violation of any federal rights, failed to allege wrongdoing by the named individuals, and failed to pierce the qualified immunity protecting them as state officials. On October 16, 1981 the Authority cross-moved for summary judgment, alleging that the suit was untimely as beyond the two-year filing period contained in the New Jersey Tort Claims Act (N.J.S.A. 59:8-8).

On November 16, 1981 the District Court rendered a decision granting the Authority's cross-motion to dismiss because Blazer's complaint was untimely but denying without prejudice the individual respondents' motion (Pa16 to Pa25). Explaining its decision, the District Court stated that because § 1983 does not contain its own statute of limitations, a federal court must apply the statute of limitations which a state court would apply had a similar suit been brought in that state's own courts (Pa-9). Reviewing the factors which the Court of Appeals for the Third Circuit has identified as relevant in that determination, the District Court concluded that Blazer's allegations against the Authority were in the nature of a tort suit against a public entity (Pa20). The District Court then observed that both state and federal court decisions in New Jersey deal-

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[4] Pursuant to the settlement, Blazer received $635,000 in addition to the $1,329,395 it had withdrawn from the Superior Court Trust Fund in November 1973, for a total of $1,964,550.

ing with federal civil rights suits against public entities have applied the two-year statute of limitations contained in the New Jersey Tort Claims Act, N.J.S.A. 59:8-8 (Pa22). The District Court thus concluded that the suit against the Authority which was filed six years after the cause of action accrued, was untimely and must be dismissed. However, because the statute of limitations in the New Jersey Tort Claims Act applies only to public entities and not to public officials, the District Court determined that the six-year limit contained in N.J.S.A. 2A:14-1, the New Jersey law governing other tort suits, was applicable to the individual respondents (Pa23). In reaching this conclusion the District Court followed decisions of the New Jersey state courts which, in federal civil rights suits against both public entities and public officials, applied the two-year limit to the entity and the six-year limit to the officials.

Though the District Court viewed the suit against the individual respondents as timely, the District Judge expressed concern that the complaint failed to allege acts or omissions by the individual respondents which would suffice in a § 1983 suit to render them liable (R805 to R806). Cautioning Blazer's attorney that liability in § 1983 action cannot be based on the doctrine of *respondeat superior,* the District Judge permitted Blazer to amend its complaint against the individuals to state with greater specificity, if it could, what wrongful acts the individual respondents committed (Pa24 to Pa25).

On December 21, 1981 Blazer moved to have the decision dismissing the suit against the Authority reconsidered or certified as a final judgment (R811 to R813). This motion was denied by the District Court on January 18, 1982 (R875 to R889). On January 6, 1982 Blazer filed an amended complaint (R830 to R873). In the amended complaint Blazer sought to make more specific allegations of wrongdoing by the individual respondents. However, the charges in the amended complaint reveal very little in the form of concrete additions to the original complaint. The allegations in the amended complaint against respondents

Serraino, Foley, Kugler, Lewis and McCrane are identical and aver guilt based upon the following:

1) each respondent was a member of the Authority pursuant to N.J.S.A. 5:10-4(b);

2) each, because of his membership on the Authority, must be deemed to have had knowledge that the purpose of the Authority was to acquire the land necessary for development of the Sports Complex and each should have known the provisions of the applicable state relocation laws;

3) each was under a duty to comply with those relocation laws, including the duty to appoint officials to formulate and effectuate a relocation plan and to insure that the Chairman of the Authority (i.e. respondent Werblin) sign the relocation plan;

4) each supposedly possessed direct and/or constructive knowledge of the "unique circumstances" of Blazer's business;

5) each unlawfully delegated his statutory responsibilities to effectuate a relocation plan to the New Jersey Department of Transportation and then, as an Authority member, failed to "oversee, direct" or otherwise monitor the actions of the Department of Transportation (R846 to R848; R851 to R853; R856 to R858; R862 to R864; R867 to R869).

As a consequence of those failures to exercise ultimate authority, each is accused of having caused the following:

1) each allegedly authorized the Authority to obtain court orders to evict Blazer;

2) each allegedly caused the eviction of Blazer without making available to Blazer relocation expenses as a condition precedent to eviction or advising it of the availability of advance payment for expenses;

3) each allegedly failed to inform Blazer of specific relocation benefits available to it and failed to assist it

in obtaining relocation assistance and a new situs for its factory;

4) the failure of each individual respondent to fulfill his obligations under the law caused the economic destruction of Blazer's business, in violation of due process and equal protection guarantees in the New Jersey and United States Constitutions (R848 to R850; R853 to R855; R858 to R861; R864 to R866; R869 to R871).

As for repsondent Werblin, who was Chairman of the Authority at the time, Blazer added the allegation that he failed to sign a form certifying the relocation plan (R843).

On January 26, 1982, the individual respondents again moved for summary judgment, contending, *inter alia*, that Blazer failed to show a violation of federal rights and that Blazer failed to allege acts attributable to the respondents which could form the basis for liability under § 1983. Blazer cross-moved for summary judgment and also moved to have Judge Ackerman recuse himself for having allegedly shown prejudice in the January 18, 1982 proceeding in which Judge Ackerman denied Blazer's motion to reconsider or certify the dismissal of the suit against the Authority.

On March 1, 1982 the District Court issued its decision denying Blazer's motion for summary judgment and granting the individual respondents' motion to dismiss. The District Court commenced its analysis by noting that, under Supreme Court and Third Circuit decisions, a person may be found liable under § 1983 only for his "own conduct or participation in a pattern of violation by virtue of knowledge, acquiescence, support and encouragement" (R945-11 to 16). Viewing the facts most favorably to Blazer, the District Court found: that Blazer received a relocation pamphlet which failed to include all requisite information; that Blazer was not provided with new relocation sites or technical assistance; that the relocation plan (called a

Workable Relocation Assistance Plan or WRAP) was never certified and did not contain an eviction policy; that all of the acts of which Blazer complains were performed or committed by employees or agents of the Authority; that the individual respondents are essentially a Board of Trustees for the Authority; and that, apart from the failure of Werblin to sign a form, all of the allegations made against the individual respondents consist of the assertion that they had, but failed to exercise, ultimate responsibility to guarantee that their employees or agents complied with every provision of the state relocation laws and regulations (R946 to R947). The District Court characterized the allegations in the amended complaint as an effort by Blazer to find the individual respondents liable on the doctrine of *respondeat superior* (R947). However, as that doctrine does not pertain in a § 1983 suit, the District Court concluded that the case against the individual respondents must be dismissed (R947 to R948).

Regarding the allegations that the respondents failed to give Blazer 90-day written notice, failed to include an eviction plan in its WRAP, and failed to certify the WRAP, the District Court concluded that the various state court orders directing dispossession constituted sufficient notice (especially as Blazer was on notice for more than nine months that it was to be dispossessed on a date certain); that the Authority lawfully delegated to DOT, under N.J.S.A. 20:4-11, the responsibility to devise and implement a satisfactory relocation plan and that the plan's failure to include an eviction policy cannot be the basis for liability of these individual respondents; and that respondent Werblin's failure to certify the WRAP was merely a procedural defect which did not affect the actual development and implementation of a relocation plan and therefore does not give rise to liability under § 1983 (citing *United States* v. *Jiles*, 658 F.2d. 194 (3rd Cir. 1981) (R948 to R954). Despite granting the individual respondents' motion for summary judgment on March 1, 1982, the District Court denied their motion for attorneys' fees, made under 42 U.S.C. § 1988 (R954 to R955).

On March 15, 1982 the District Court issued its Order reflecting its decision of March 1, 1982 denying Blazer's motion for summary judgment and granting the individual respondents' motion for summary judgment (R956 to R957). The petitioner then appealed to the Court of Appeals for the Third Circuit, complaining that the District Court erred in applying the two-year statute of limitation in the New Jersey Tort Claims Act to the Authority and in dismissing the suit against the individual respondents. In a two sentence judgment the Third Circuit affirmed the District Court decision. The Third Circuit's decision, in its entirety, is as follows:

> "Blazer Corporation appeals from a final order granting summary judgment against it on its Section 1983 complaint against the New Jersey Sports and Exposition Authority and certain of its officials. Since the complaint fails to state a cause of action of violation of that section, it is
>
> ORDERED, ADJUGED and DECREED that the judgment be and is hereby affirmed.
>
> Costs are taxed in favor of appellees."

Pa37 to Pa38).

On December 29, 1982 the Third Circuit denied Blazer's request for a rehearing *en banc* (Pa39 to Pa40).

Summary of Argument[5]

The petitioner asks that this Court grant a writ of certiorari because of an alleged conflict in the circuit courts regarding the most analogous state statute of limitations

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[5] The Authority and the individual respondents have been and remain represented by separate counsel. Because the dismissal of the suit as untimely involved only the Authority, the individual respondents will not address that aspect of the case other than to note that the Third Circuit never reached that issue. The substantive argument on the timeliness issue is fully argued in the Authority's brief in opposition to the petition.

and because of an alleged misapplication by the courts below of the doctrine of *respondeat superior* in a § 1983 context. The individual respondents respectfully submit that the decisions below do not present this Court with any basis or need for review or correction. The petitioner has presented a prodigiously assembled but entirely irrelevant argument which fundamentally ignores an unavoidable obstacle, to wit: the Third Circuit's two-sentence affirmance simply does not embroil that court in a conflict with its sister circuits and does not delineate a novel interpretation of *respondeat superior* in the context of a § 1983 suit.

As the respondent Authority points out in its brief in opposition to the petition, the Third Circuit decision is absolutely silent on the applicable state statute of limitation to be adopted by a federal court in a § 1983 case. The reason for the Third Circuit's silence on that topic is hardly obscure. That court was of the opinion that the petitioner's complaint does not set forth a cause of action at all. Because of the absence of any actionable misconduct in the complaint itself, the Third Circuit sagely avoided reaching the "limitation" issue heatedly urged by the petitioner. This Court should similarly avoid addressing an issue which is not necessary to the disposition of the litigation.

Nor did the Third Circuit explicate or approve of a new interpretation of *respondeat superior*. This petitioner seeks to hold the individual respondents guilty of violating § 1983 not because of any specific act or policy which they performed, adopted, or condoned but, rather, because they supposedly failed to exercise the ultimate oversight authority they possessed solely by virtue of their membership on the Authority's board. Not one allegation connects any individual respondent with actual knowledge of any wrongdoing. Instead, all allegations are predicated upon "constructive" knowledge, grounded in a statutory responsibility for acts of the Authority. The allegations in the complaint, even as amended, do not meet this Court's requirements for imposing liability

under § 1983. *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 691 (1979); *Rizzo* v. *Goode*, 423 U.S. 362 (1976). The only specific misdeed alleged is the failure of respondent Werblin to actually sign a standardized form certifying the relocation plan, even though the relocation plan had been approved by the appropriate state agency and was in actual fact effectuated. The District Court properly found that the certification requirement was merely an internal monitoring device designed to assist the state, not the relocatees, and that the omission did not give rise to a cause of action under § 1983. *United States* v. *Jiles*, 658 F.2d 194 (3d Cir. 1981), *cert. den.*, 455 U.S. 625 (1982).

In sum, the Third Circuit decision represents an appropriate treatment of the content of the allegations contained in the complaint viewed against the elements and burdens of proof applicable in cases arising under § 1983. The Third Circuit was correct in its conclusion that no cause of action exists. There is no reason for this Court to review that conclusion.

ARGUMENT

This Court should deny petitioner's request for a writ of certiorari because the courts below properly dismissed the complaint as failing to state a cause of action and because there exist no issues of public import or legal significance which warrant this Court's review.

In its amended complaint the petitioner, Blazer, does not aver any violation of a federal regulation or statute by any respondent. Nor is it contended that the respondents infringed any substantive Constitutional right. Blazer's argument is that the respondents somehow violated its due process and equal protection rights by allegedly failing to comply with various state relocation laws when they displaced Blazer in 1974. Moreover, the putative liability of the individual respondents is not de-

rived from any actual misdeed or knowing condonation of malevolent acts, but from their "constructive" knowledge and their ultimate responsibility as board members. Furthermore, all of the wrongful acts or omissions claimed by Blazer occurred while the condemnation and displacement action against Blazer was being heard in state courts. Though Blazer clearly could have and should have contested the relocation issues when it was a defendant in the state court in 1973 and 1974, it inexplicably waited six years to bring this purely state matter to a federal court.

Unfortunately for Blazer, the courts below recognized this suit for what it is: a fatuous effort to procure monies from a state entity for whatever miniscule infractions this petitioner could discover in its microscopic and tardy probe into the enormous and now successful project which has brought professional sports to New Jersey. The courts below scrutinized Blazer's complaint and found it totally lacking in substance under the standards applicable for suits under § 1983. In rendering the decisions below, the District Court and Third Circuit properly heeded the admonition that § 1983 is not to be misused as a catch-all by which a party runs to federal court to review any action of state officials. *Paul* v. *Davis*, 424 U.S. 693 (1976); *Sullivan* v. *Brown*, 544 F.2d 279, 284 (6th Cir. 1976).

From 1972 to 1974 the Authority carried out the Legislature's mandate to acquire acreage for the construction of a Sports Complex to serve the recreational needs of the citizens of New Jersey. Pursuant to the express provisions of the New Jersey Relocation Assistance Act of 1971, N.J.S.A. 20:4-11,[6] the Authority delegated the de-

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[6] N.J.S.A. 20:4-11 provides:

> "In order to prevent unnecessary expense and duplication of functions, and to promote uniform and effective administration of relocation assistance programs for displaced persons, the commissioner may authorize any taking agency to . . . carry out its functions under this act through any Federal or State agency or instrumentality having an established organization for conducting relocation assistance programs."

velopment and implementation of the requisite relocation plan and procedures to the DOT an agency experienced in relocation matters. The DOT devised and effectuated an extensive relocation plan, assigned four relocations officers to implement the plan, and acquired the designated properties in state court proceedings.

As part of the development of the Sports Complex, Blazer's facility was condemned and the money placed into a Superior Court Trust Fund. Upon Blazer's withdrawal of those monies on November 12, 1973, full title to their premises passed to the Authority, and Blazer remained only with the consent of the Authority. N.J.S.A. 20:3-19. A Court Order of November 12, 1973 specified the date of February 1, 1982 by which Blazer was to vacate the premises. That date was repeatedly extended by request of Blazer and with the written consent of the Authority until June 1974, when the Authority was advised by its engineers that any further postponement in Blazer's departure would entail enormous additional expenditures. Accordingly, the Authority returned to court to obtain yet another Order, establishing August 15, 1974 as the final date for vacation of the premises or the Sheriff would evict.

At no point during the relocation process or the condemnation proceedings in 1973 and 1974 did Blazer ever contest the validity of the relocation plan, the actions or inactions of relocation officers, or the notice of displacement. Rather, Blazer waited six years to cull through a myriad of state relocation rules existing in 1974 in an effort to discover some procedural flaw, no matter how irrelevant to Blazer itself. Believing that it found departures from full compliance with the state relocation rules, Blazer now asks the federal courts to compel state officials to make monetary absolution. However, the District Court properly dismissed this suit because Blazer has failed to allege any direct acts of, or participation in, wrongdoing by these state officials and because the

defects in the relocation plan claimed by Blazer, even if true, do not give rise to a cause of action under § 1983

Examination of the allegations against the individual respondents contained in the amended complaint and summarized in Blazer's petition reveals that the alleged culpability of the individual respondents is predicated upon the notion that as members of the Authority they have the ultimate responsibility and liability for every single misdeed or omission of every employee or agent of the Authority, even where the act or omission was committed by a separate state agency to whom the duty to carry out this relocation plan was properly delegated. Indeed, Blazer even seeks to impose liability on these respondents for having obtained court orders directing the displacement of Blazer. Utterly absent from the charges in the amended complaint is any claim that these respondents actually committed, participated in, or encouraged any acts of wrongdoing surrounding the development of a relocation plan and its application to Blazer. Apart from the failure of respondent Werblin to sign a form, which will be addressed later, all the allegations are founded on the proposition that government officials can be found liable under § 1983 for their failure to exercise ultimate supervisory authority over agents or employees of that governmental entity.

However, it is clear beyond cavil that a state official cannot be found liable under § 1983 absent a showing that he had, by his *own* direct conduct, denied federal rights belonging to another. *Rizzo* v. *Goode*, 423 U.S. 362, 370-371, 377 (1976) (emphasis in original). Governmental bodies, and their constituent members, may not be held liable simply because they employed a tortfeasor. *Monell* v. *New York City Department of Social Services*, 436 U.S. 658, 691 (1979). Simply stated, *respondeat superior* does not pertain in § 1983 actions. *Id.*, 436 U.S. at 691. Moreover, and significantly, a government official's failure to exercise his authority to prevent wrongdoing by those in his service is insufficient grounding

for guilt under § 1983. *Monell* v. *NYC Dep't of Soc. Services*, 436 at 694 n. 58; *Rizzo* v. *Goode*, 423 U.S. at 376; *Watson* v. *Interstate Fire & Casualty Company*, 611 F.2d 120, 123 (5th Cir. 1980).

In opposition to these well settled principles, Blazer relies upon *Naughton* v. *Bevilacqua*, 605 F.2d 586, 589 (1st Cir. 1979). That reliance is misplaced. In *Naughton* the Court of Appeals affirmed the trial court's dismissal of a suit against the Director of the Rhode Island Department of Mental Health because he could not be held liable for the unconstitutional conduct which occurred in the institutions he supervised. The plaintiff in *Naughton*, a patient in a state mental institution, sued, among others, the state's director of mental health institutions, who was empowered by statute with the duty to administer and supervise the operation of, and treatment in, those institutions. *Id.*, 605 F.2d at 588-589. The suit alleged that the institutions administered improper medication as as part of a deliberate plan of treatment. The trial court found that the allegations stated a substantive cause of action cognizable under § 1983, but dismissed the case against the director because there were no allegations that he played a "personal role" in the wrongdoings. The First Circuit affirmed the dismissal. While acknowledging that the director had the statutory duty to police the care of the patients in his agency's institutions, the court upheld the dismissal because "these stautory duties bear only the most tangential relationship to the focal point of this lawsuit: the quality and nature of [plaintiff's] day-to-day care at [the institution.]" *Id.*, 605 F.2d at 589. Emphasizing that the plan of treatment and acts of misconduct alleged were committed by members of the director's staff but not by the director himself, the court concluded that the director could not be found liable. *Id.*, 605 F.2d at 589-590. The factual and legal content of the instant case falls squarely within the rationale and ruling in *Naughton*.

In short, the courts below correctly concluded that the allegations in Blazer's complaint fail to allege acts or

omissions by these individual respondents which would suffice as a matter of law to hold them liable under § 1983. Thus, even without considering the merits and legal ramifications of the three defects in the relocation plan claimed by Blazer, no actionable liability can be imputed to these individual Authority members. In short, the courts below properly applied the correct legal precepts of liability in the § 1983 context. Contrary to Blazer's assertion, this case does not involve a novel or unique interpretation of *respondent superior*.

However, even assuming, *arguendo*, that the individual respondents may somehow be held personally liable under § 1983 for any procedural errors in the relocation plan devised and implemented by DOT, the procedural deficiencies claimed here do not give rise to a violation of a federal right actionable under § 1983. Blazer complains of four defects in the relocation process: (a) a lack of 90-day written notice, (b) failure to have an "eviction policy" in the plan (c) failure by respondent Werblin to sign a certification form, and (d) failure to inform Blazer of its right, under state statute, to apply for and receive payment of relocation monies prior to the relocation. None of these complaints has any merit.

As the District Court observed, on November 12, 1973 Blazer's owner and its attorney signed a Court Order agreeing to vacate the premises by February 1, 1974.[7] Clearly Blazer had written notice that it had to vacate its facility by a date certain: February 1, 1974: Furthermore, Blazer requested, and was granted, several extensions of time in which to vacate: the first extension was to May 1, 1974 and then to June 1, 1974. Each extension was made

[7] It is noteworthy that by the terms of that November Order, Blazer withdrew the $1,329,395 placed by the Authority in trust for the property. Under New Jersey condemnation law, withdrawal of those sums by the condemnee passes full title and right to possession to the condemnor. N.J.S.A. 20:3-19. Indeed, a condemnee who remains on the property more than 20 days after withdrawing the money is a trespassor. N.J.S.A. 20:3-19.

at the behest of Blazer, each was confirmed in writing, and each writing was embodied in a Court Order amending the original February 1, 1974 date to reflect a new date certain. Racanelli's call sheets unequivocally show that Benjamin Blazer and his attorney were well aware of the Court Orders and the various specific dates for displacement. The claim by Blazer that it was unlawfully denied proper written notice rings hollow.

Also vacuous is Blazer's assertion that the failure of the relocation plan to contain an "eviction policy" constitutes a violation of a federal right. Preliminarily, it is important to note that the requirement for an "eviction policy" is not contained in either the 1967 or the 1971 state relocation laws. Rather, the call for an eviction policy is found in regulations of the New Jersey Department of Community Affairs (R630 to R754). Those regulations set forth a general declaration that eviction should be used as a last resort and only for the reasons enumerated in the rules (R673). Included among those reasons is: "The eviction is required by judicial action." (R674). In this case the displacement was necessited by legislative mandate and carried out by judicial order. Simply stated, N.J.S.A. 5:10-6 directed the Authority to acquire the land at issue. Displacement of those persons on the land was not debatable, avoidable, or waivable; it was a legislative edict. Furthermore, acquisition of the designated properties was accomplished through state court proceedings under the state laws. All displacements occurred pursuant to judicial action and orders.

Moreover, looking at the substance of the "eviction policy" called for by the Community Affairs regulations, it is evident that the entire "policy" consists of the requirement that the relocation plan "inform all persons who are expected to be displaced by acquisition about the eviction policies to be pursued in carrying out the project" (R646). It is patently obvious that this requirement was in fact followed. As early as 1972 Blazer was informed that its property and buildings were to be acquired by the Au-

thority and that appraisers would be assessing its value. In March 1973, the Authority commenced condemnation proceedings in state court. Blazer participated in those proceedings and knew full well that it was being displaced, how it was being displaced, and when it was being displaced. It is simply incredulous that a party who withdraws condemnation funds in November 1973, thereby passing full title and right to possession to the Authority, and who signs an Order agreeing to vacate those premises by February 1, 1974, can subsequently claim that in August 1974 it was not aware of the Authority's displacement intentions. Under the facts of this case, and as a matter of law, the absence in the relocation plan of an "eviction policy" does not constitute the sort of actionable harm cognizable as a federal right. *Storer* v. *Brown*, 415 U.S. 724, 729-730 (1974); *United States* v. *Jiles*, 658 F.2d at 200; *Governor of Virgin Islands* v. *Berry*, 604 F.2d 221, 225 (3d Cir. 1979); *United Family Farmers, Inc.* v. *Kleppe*, 418 F. Supp. 592, 602-603 (D.S.D. 1976).[8]

The third procedural defect cited by Blazer, and the only allegation dealing with an action statutorily imposed upon a member of the Authority, concerns the failure of respondent Werblin to sign the certification form (R469) mandated by the 1967 relocation law. N.J.S.A. 52:31B-5. However, as the District Court properly ruled, this omission does not rise to the level of a constitutional tort.

The District Court explained that the DOT did develop and fully implement an extensive and complex relocation plan. A review of the plan (R480 to R567) and an examin-

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[8] Interestingly, the Community Affairs regulations were revised in 1979. N.J.A.C. 5:11-1*et seq.* The revised rules makes plain that the "eviction policy" requirements do not pertain to relocations made pursuant to the state relocation laws but, rather, apply to conduct of landlords under N.J.S.A. 2A:18-61.1. Thus the 1979 list of required elements of a Workable Relocation Assistance Plan (N.J.A.C. 5:11-6.1) does not mention eviction or eviction policy. Rather, the only reference to eviction in the 1979 regulations is in conjunction with N.J.S.A. 2A:18-61.1, which concerns removal of residential tenants.

ation of the affidavits and call sheets of Racanelli leave no room for doubt that the relocation plan was implemented. In light of the actual implementation of the plan, the failure of respondent Werblin to sign a form simply does not represent the sort of omission which gives rise to a cause of action under § 1983. As the Third Circuit recently declared:

> "Not all violations of state laws rise to the level of constitutional error . . . [Citations omitted]. In determining whether the violation of a particular state law deprived a defendant of his due process rights under the fifth amendment, we must ascertain whether the state law directly conferred a substantive right on the defendant or merely created an administrative plan to help the state regulate its officers' conduct. *Slotnick* v. *Staviskey,* 560 F.2d 31, 34 (1st Cir. 1974), *cert. denied,* 434 U.S. 1077, 98 S.Ct. 1286, 55 L.Ed.2d 783 (1978) ('The simple fact that state law prescribes certain procedures does not mean that the procedures thereby require a federal constitutional dimension.') See also *Screws,* 325 U.S. at 108, 65 S.Ct. at 1038; *Street* v. *Surdyka,* 492 F.2d 368 (4th Cir. 1974)."

United States v. *Jiles,* 658 F.2d at 200. Only where the safeguard contained in the state law confers a property or liberty right does due process protection exist. *Id.* While the factual context of the *Jiles* decision was a criminal proceeding, its sound reasoning has been applied in a purely civil setting. *King* v. *Hilton,* 525 F. Supp. 1192, 1198 (D.N.J. 1981).

The requirement of signing a form certifying that a relocation plan has been developed is a procedural safeguard which does not confer a due process right upon Blazer. As the District Court explained:

> "The DCA forms 101 and 102 are the same kind of procedural safeguard as was at issue in *Jiles.* There can be no doubt that a WRAP was promul-

gated by DOT under contract to the Authority, and that it was implemented to some degree at least. The WRAP was submitted to the Commissioner of DCA pursuant to the Acts who found that 'the manner in which you propose to relocate persons displaced and the resources available for their relocation comply with the requirements of the Relocation Assistance Law of 1971 and the regulations promulgated thereunder.' See letter from Commissioner Kramer to James Hyde, dated July 20th, 1973. The Commissioner concluded the letter by saying that the approval of the WRAP is contingent on the submission of these forms.

"For summary judgment purposes, the evidence does not show that the forms were ever submitted. However, I do not find that plaintiff had a property interest in this safeguard. It was the intention of the Acts that relocation of plaintiff proceed pursuant to a WRAP, but one was prepared for the Authority and implemented. The signature of Defendant Werblin on these forms can only be deemed part of 'an administrative plan to help the state regulate its officers conduct.' See *Jiles* at page 200.

"To say that but for these forms, the field officers would have properly informed plaintiff of its rights under the Acts and but for this plaintiff would not have been unprepared financially and physically to relocate is to travel down the same supervisory road covered before.

"I find that the Defendant Werblin did not commit a constitutional tort." (R952 to R954).

Under the facts of this case, the failure of respondent Werblin to certify the forms does not nullify the plan and does not render him, or any Authority member, liable to this petitioner under § 1983. *Storer* v. *Brown*; *United States* v. *Jiles; King* v. *Hilton, supra.*

Consequently, even assuming the existence of the defects in the relocation plan claimed by Blazer, it is clear that they do not give rise to a violation of a federal right remediable in a § 1983 action. The District Court was eminently correct in dismissing this case against the individuals for failure to allege actionable wrongdoing by them.

Similarly meritless is Blazer's assertion that it was denied payment of relocation funds as a "condition precedent" to its actual relocation. To be sure, the relocation statute does provide for advance payment of funds. N.J.S.A. 20:4-10(a)(2). However, as that statute unambiguously states, advance payment will only be made upon "proper application by the displacee." N.J.S.A. 30:4-10(a)(2). It is uncontroverted that Blazer never made application for advance payments. The federal courts, construing an identical provision in the essentially similar federal relocation law (42 U.S.C. § 4622), repeatedly ruled that a displacee who fails to apply for advance relocation payment cannot be deemed to have been unlawfully denied those benefits. *Boston* v. *United States,* 424 F. Supp. 259, 266 (E.D. Mo. 1976); *Smith* v. *City of Cookeville,* 281 F. Supp. 100, 106 (MD. Tenn. 1974.[9]

From all of the foregoing it is plain that these individual respondents are not liable under § 1983 since they did not directly commit or participate in any of the putative wrongdoings. Moreover, even if the procedural flaws in the relocation process implemented by DOT can be legally

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[9] In its petition, and in the proceedings below, Blazer complains that the respondents never expressly informed it that it had the right to apply for advance relocation payment. However, Blazer has never explained why it own attorneys failed to exercise a right provided to it by statute. In oral argument in District Court, Blazer's attorney, asserting that an 11-year old child could read the relocation statute, becried the inability of the Authority's attorneys to comprehend that statute. The Judge then inquired as to the age of Blazer's attorneys and asked why they failed to invoke Blazer's statutory rights when the relocation process was occurring (R788 to R790).

imputed to these respondents (and they can not), those defects do not give rise to a cause of action under § 1983.

Though the District Court concentrated its attention on the inapplicability of the doctrine of *respondeat superior* in a §1983 case and on the fact that the violations alleged do not constitute an actionable wrong under § 1983, another related but independent reason exists which bars this suit under § 1983.

It is well settled that in order for a cause of action to accrue under § 1983, the plaintiff must establish that the defendant contravened a right secured by a federal statute or the federal Constitution. *Maine* v. *Thiboutet*, 448 U.S. 1, 4-5 (1980); *Owen* v. *City of Independence*, 445 U.S. 622, 636 (1980); *Monell* v. *N.Y.C. Dep't of Soc. Services*, 436 U.S. at 700-701. Jurisdiction does not lie under § 1983 where a violation of only state laws is alleged or proven. *Paul* v. *Davis*, 424 U.S. at 698-699; *Crocker* v. *Hayes*, 616 F.2d 237, 240 (5th Cir. 1980); *Tucker* v. *Duncan*, 499 F.2d 963, 965 n. 1 (4th Cir. 1974); *Karr* v. *Bloy*, 413 F. Supp. 579, 584 (N.D. Ohio 1976). As the federal court in Ohio summarized:

> "Since jurisdiction of the action lies under [§ 1983], the Court has authority only to review state action that allegedly deprives plaintiff of a federal right. Whether state officers have obeyed state statutes presents an issue of a state right not a federal right. A state official may act unlawfully under state law without thereby violating the Constitution . . . State courts are the proper forum in which to raise issues of compliance with these state laws."

Karr v. *Bloy*, 413 F. Supp. at 584.

The Sports Complex was completed without any federal funding or involvement. Though Blazer originally alleged a violation of the federal Uniform Relocation Act, it has

dropped that charge in its amended complaint.[10] Accordingly, no issue of a violation of federal statutory rights obtains. Rather, the issue here is whether the infringements of state relocation laws which allegedly transpired here infringed Blazer's rights under the United States Constitution.

There is, however, no constitutional right to relocation assistance. *United States* v. *Westinghouse Elec. & Mfg.*, 339 U.S. 261, 264 (1950) ("property" for purposes of Fifth Amendment does not include "expenses of removal or of relocation"); *United States* v. *General Motors Corp.*, 323 U.S. 373, 377-379 (1946). (the expense of moving removable fixtures and personal property from premises following condemnation is not covered by Fifth Amendment); *Mitchell* v. *United States*, 267 U.S. 341, 345 (1924); *Monogahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893); *R. J. Widen Co.* v. *United States*, 357 F.2d 988 (Ct. of Cl. 1966); *Wahn Chang Corp.* v. *United States*, 282 F.2d 728, 735-736 (Ct. of Cl. 1960); *State* v. *Gallant*, 42 N.J. 583, 587-588, 202 A.2d 401 (1964) ("Our courts have also held that the fee owner is generally not entitled to compensation for personalty abandoned in the condemned premises nor for the expenses of removing personalty. [citations omitted]. Moving expenses in connection with the condemnation of leasehold interests have as well been disallowed [citations omitted];" *State Commissioner of Transportation* v. *Cooper Alloy Corp.*, 136 N.J. Super. 560, 568, 347 A.2d 365 (App. Div. 1975). Thus, even if Blazer was denied, or hin-

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[10] Blazer had contended that the respondents violated the federal Uniform Relocation Act of 1970, 42 U.S.C. 4601. (R18). However, discovery revealed that the Sports Complex was developed and constructed without federal funding, thereby rendering the federal relocation laws irrelevant. Accordingly, Blazer dropped its claim of violation of the federal relocation laws. See Amended Complaint (R830 to R875).

dered in obtaining, relocation assistance, that does not give rise to a claim of constitutional dimension.[11]

Finally, Blazer alleges in its petition (Pb7) that the respondents violated its right to the equal protection of the laws as guaranteed by the Fourteenth Amendment. However, and significantly, the petition is barren of any argument concerning that contention. That absence is hardly surprising. In order to establish a violation of equal protection rights by government officials, a plaintiff must show that the officials acted intentionally and invidiously in treating one class differently than a similarly situated class. *Washington* v. *Davis*, 426 U.S. 229 (1976); *Griffen* v. *Beckenridge*, 403 U.S. 88, 102 (1971). In this case there is nothing in the complaint, other than one bald-faced assertion that the individual respondents acted wantonly, which would even support the notion that these respondents acted with malevolent deliberation. On the contrary, the core of the petitioner's charges against the individual respondents is that they are passively liable because of their ultimate, statutorily-based responsibility for the acts of the Authority's agents. Moreover, the complaint utterly fails to indicate what classes were created and affected by the respondent's conduct or how the petitioner was treated differently than any other displacee. Again, the reason for the lack of this essential material is not difficult to discern. The fact is, the alleged defects in the relocation plan were systemic in nature, thereby affecting everyone equally.

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[11] In its petition Blazer also asserts as a basis for granting certiorari the need for the Court to clarify its recent "due process" decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981). Interestingly, the putative need for clarification derives not from any statement by any of the courts below but, rather, from the fact that the respondents had argued in their briefs that the reasoning in *Parratt* provided an additional basis for dismissing Blazer's suit. However, that argument was never adopted by either court below, was never an element in the decisions granting summary judgment, and should not cause this Court to undertake the clarification urged by Blazer. *Owens* v. *Union Pacific R.R. Co.*, 319 U.S. 715, 724-725 (1942).

If, as Blazer avers, the relocation plan was deficient because it did not contain an eviction policy or because it was not certified by Werblin or because it did not (or mistakenly) informed persons of their rights under the relocation laws, then these deficiencies infected the entire relocation process. Because of the utter absence of any supportable assertion that the respondents acted with invidious intention to harm this petitioner, and because of the absence of any differential treatment based upon some sort of classification, Blazer's equal protection claim lacks any merit.

In sum, the courts below correctly applied traditional precepts of law in properly determining that Blazer's complaint, even as amended, did not state a cause of action under § 1983. Nothing in those decisions warrants review by this Court.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny Blazer's petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BLAZER CORPORATION,

Petitioner,

—v.—

NEW JERSEY SPORTS AND EXPOSITION AUTHORITY, DAVID A. WERBLIN, CHARLES SERRAINO, ADRIAN M. FOLEY, JR., GEORGE F. KUGLER, JR., AUBREY C. LEWIS, JOSEPH M. MCCRANE and "JOHN DOES", said names being fictitious,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Dated: June 3, 1983

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner submits this brief, pursuant to the provisions of Rule 22.5 of this Court, in reply to the opposition briefs of respondents. It deals with the arguments first raised in respondents' briefs that this Court should deny the petition because the *ratio decidendi* of the Third Circuit, in affirming the decisions appealed from, did not involve the issues of the statute of limitations, *respondeat superior,* administrative exclusion, and post-deprivation remedies availability grounds underlying the District Court opinions, but instead involved its own unarticulated determination that the complaint did not "state a cause of action". See Brief of Respondent New Jersey Sports and Exposition Authority, p.12 (referred to hereafter as

the "Sports Authority Brief") and Brief of Individual Respondents, pp.14, 15 and 16.

The Third Circuit affirmed the two District Court opinions appealed from with the language:

> "Since the complaint fails to state a cause of action for violation of that section, it is ORDERED, ADJUDGED and DECREED that the judgment be and is hereby affirmed."

As counsel for the Sports Authority explains the theory of affirmance on mystery grounds,

> "While [the statute of limitations and *respondeat superior*] . . . grounds may have formed the basis for the judgments of the District Court, they clearly did not form the basis for the judgment of the Court of Appeals for the Third Circuit." (Sports Authority Brief p.12 (note))

By suggesting that what the Third Circuit upheld in affirming the decisions appealed from was not the issues ruled upon below but instead some unarticulated and undisclosed insufficiency in the amended complaint, respondents are injecting a red herring into the *certiorari* petition process. Not even respondents are bold enough to suggest what were the amended complaint's inadequacies upon which the Third Circuit's affirmance was based (notwithstanding the penchant of counsel for the Sports Authority for straying beyond the record below (See, e.g., the second note at p.12 of Respondent Sports Authority's brief)). They merely suggest that because the Third Circuit said nothing more than it did, it must have been deciding a new issue not dealt with in the District Courts.

Petitioner suggests that respondents' reasoning defies logic and order in any reasonable system of appellate review. If the Third Circuit, affirming the decisions below were doing so on the basis of entirely new issues, the minimum which a system of ordered justice requires would have been a brief articulation of what those issues were.

However, we need not speculate long about the choice of language utilized by the Court of Appeals. A brief review of the District Court opinions establishes the context of the Third Circuit's phrase "fails to state a cause of action". As the District Court observed in the opinion of November 16, 1981 (Petition Appendix at pp. 16a-25a):

> "A statute of limitations defense is properly considered a species of the defense of failure to state a claim upon which relief can be granted." (*id* at p.18a)

To be sure, the District Court in the November 16, 1981 opinion, after dismissing the complaint against the Sports Authority on statute of limitations grounds, went on to dismiss the complaint against individual defendants for failure to state a cause of action. However, it also granted leave to amend (*id.* at p.23a).

Petitioner did serve an amended complaint (See Petition Appendix at p.28a), and the decision of March 1, 1982 followed. That decision (Petition Appendix pp.26a-35a) granted the motion to dismiss on specific grounds which are raised in the Petition as issues for consideration by this Court. In so ruling the Court held that the amended complaint failed to state a cause of action against the Authority because it was predicated upon notions of *respondeat superior* (*id.* at 30a). It also held that the amended complaint failed to state a cause of action against individual respondent Werblin because his derelictions were merely part of an administrative plan and not of constitutional dimension (*id.* at p.33a-35a). In each instance the District Court ruled that the amended complaint "fails to state a claim cognizable under Section 1983" (*id.* at 34a). We submit that these references were adopted and incorporated by the Third Circuit when it held that the amended complaint "fails to state a cause of action". Fairly construed, the language thus incorporates not only the statute of limitations issue but also the *respondent superior* and administrative remedies issue briefed by petitioner.

The Third Circuit's ruling is "cryptic", as we originally characterized it, because it does not single out the precise areas which the Circuit Court found to be legally deficient. It can therefore only be concluded that the Circuit Court affirmed in all respects the District Court opinions appealed from. It was upon that basis that petitioner framed its petition for writ of *certiorari*, challenging the specific reasoning of the District Courts, which by a fair construction of the language of the affirmance, it submits that the Third Circuit adopted.

In fact the Complaint did generally state a cause of action. Indeed, a decision of the District Court's Chief Judge Clarkson F. Fischer so ruled (See Appendix to Petition pp.13a-15a):

> ". . . Thus, a cognizable claim under § 1983 has been alleged.
>
> Since plaintiff has alleged a valid § 1983 claim, there is generally no need to exhaust state administrative or judicial remedies . . ." (*id.* at 14a)

This decision was *not* appealed from by any respondent.

Finally, counsel for petitioner object professionally to the repeated resort by counsel for the Sports Authority to allegations that petitioner has "misrepresented" the record and has made "factually misleading" arguments (See Sports Authority Brief at p.12 (notes). See also pp.27, 29.) Such loose, unsupported and desperate allusions serve to highlight the insecurity which respondent's counsel must sense about the strength of their client's position. Counsel for petitioner will gladly suffer these professionally unjustified slings and arrows as their contribution to the cause of emphasizing the strength of petitioner's case.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully renews its request that this Court grant the petition for writ of *certiorari* to review the judgment of the Court of Appeals for the Third Circuit.

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